142-664
142-664

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 139.

WILLIAM EDGAR BIRD, PLAINTIFF IN ERROR,

vs.

SAMUEL BENLISA, ADMINISTRATOR DE BONIS NON OF MOSES E. LEVY, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

FILED OCTOBER 1, 1888.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court, fifth judicial circuit, northern district of Florida, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Samuel Benlisa, as administrator *de bonis non* of the estate of Moses E. Levy, and William Edgar Bird, a manifest error hath happened, to the great damage of the said Wolliam Edgar Bird, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein —, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the eighth day of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being *sus*pected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and customs of the United States should be done.

Witness the Honorable Samuel F. Miller, senior justice of the Supreme Court of the United States, and the seal of the [SEAL.] said circuit court, at the city of Jacksonville, in said district, this eighteenth day of April, A. D. 1888.

PHILIP WALTER, *Clerk.*

Allowed by—
THOMAS SETTLE,
District Judge, Sitting as Circuit Judge for the Dist. Aforesaid.

Endorsement: Supreme Court of the United States. Wm. E. Bird, pl'ff in error, *vs.* Sam'l Benlisa, as adm'r *de bonis non* of the estate of Moses E. Levy, dec'd. Writ of error. Filed April 19, 1888. P. Walter, clerk.

2 UNITED STATES OF AMERICA, *ss:*

To Samuel Benlisa, as administrator *de bonis non* of the estate of Moses E. Levy, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court, fifth judicial circuit, northern district of Florida, wherein William Edgar Bird is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not

be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand this 18th day of April, 1888.

THOMAS SETTLE,
District Judge, Sitting as Judge of the said Circuit Court in the District Aforesaid.

Endorsement: Received the within writ April 19th, 1888, and executed the same April 19th, 1888, within the southern district of Florida by delivering a true copy hereof to Samuel Benlisa, as administrator *de bonis non* of the estate of Moses E. Levy, and at the same time exhibiting this original writ. W. C. Bird, U. S. marshal. Supreme Court of the United States. Wm. E. Bird, pl'ff in error, *vs.* Sam'l Benlisa, as adm'r *de bonis non* of the estate of Moses E. Levy, deceased, def't in error. Citation. Filed Apr. 21, 1888. Philip Walter, clerk.

3 In Circuit Court, Orange County, 7th Circuit, Florida.

SAMUEL BENLISA, as Administrator *de bonis non* of Estate of Moses E. Levy, Deceased, *vs.* C. N. CURTIS and WILLIAM E. BIRD.	Ejectment. Mesne Profits, $5,000.00.

The clerk of said court — please issue ad summons *ad res.* to defendants in above cause, returnable to rule day to June, A. D. 1887. Mesne profits claimed, $5,000.00.

C. P. AND J. C. COOPER,
Attorneys for Plaintiff.

Description of Land Sued for.

Copy to be attached to summons.

These tracts of land in Orange county, State of Florida, known as the "Moses E. Levy grant," described on Government surveys as sections 37, in township 17 south, of range 27 east; also section 39, township 16 south, of range 27 east; also section 38, in township 16 south, of range 27 east, containing 9,000 acres, more or less.

Filed in office of clerk circuit court Orange county, Florida, May 25, 1887.

T. J. SHINE, *Clerk*,
By J. N. BRADSHAW,
Deputy Clerk.

4 State of Florida to the sheriff of Orange county, Greeting:

We command you to summon C. N. Curtis & William E. Bird, if they be found within the county of Orange, personally to be and appear before the judge of our circuit court for said county, at the court-house, in Orlando, on the first Monday in June next, being a rule day of our said court and the 6 day of June, 1887, to answer Samuel Benlisa, as administrator *de bonis non* of estate of

Moses E. Levy, deceased, in an action of ejectment—mesne profits, $5,000; and have then and there this writ.

Witness T. J. Shine, clerk of said circuit court for the county of Orange, and the seal of said court, at Orlando aforesaid, on this 25 day of May, A. D. 1887.

T. J. SHINE, *Clerk*,
[SEAL.] By J. N. BRADSHAW, *D. C.*

Description of Land Sued for.

Copy to be attached to summons.

Those tracts of land in Orange county, State of Florida, known as the "Moses E. Levy grant," described on Government surveys as section 37, in township 17 south, of range 27 east; also section 39, in township 16 south, of range 27 east; also section 38, in township 16 south, of range 27 east, containing 9,000 acres, more or less.

Endorsement: Circuit court, Orange Co., Fla. Samuel Benlisa, adm'r, *vs.* C. N. Curtis *et al.* ("Original.") Summons *ad respondendum.* June rules day, 1887. C. P. & J. C. Cooper, plaintiff's attorneys. Filed 6 day of June, 1887. T. J. Shine, clerk, by J. N. Bradshaw, deputy. Rec'd 25th of May, 1887. Served the same by leaving a copy with C. N. Curtis, a- agent, for himself, & also one with C. N. Curtis for Wm. E. Bird *ar* his place of abode with a person above the age of 16 years and residing on the place this 26th day of May, A. D. 1887. J. C. Anderson, sheriff.

Service	$1 00
Copy	30
Return	10
Mileage	7 00
	$8 40

In Circuit Court, Orange County, 7th Circuit, Florida.

SAMUEL BENLISA, as Administrator *de bonis non* of Estate of Moses E. Levy, Deceased,
vs.
C. H. CURTIS and WILLIAM E. BIRD.

Ejectment. Mesne profits, $5,000.00.

ORANGE COUNTY, *To wit:*

Samuel Benlisa, as administrator *de bonis non* of estate of Moses E. Levy, deceased, by C. P. & J. C. Cooper, his attorneys, complains of C. H. Curtis and William E. Bird, who have been summoned to answer him in and action of ejectment, for that whereas the said defendants are in possession of a certain tract of land situate in said county of Orange and State of Florida, described as follows, to wit: The "Moses E. Levy Grant," described on Government surveys as

section 37, in township 17 south, of range 27 east; also section 39, township 16 south, of range 27 east; also section 38, in township 16 south, of range 27 east, containing 9,000 acres, more or less, of the value of $10,000.00, to which said plaintiff claims that said Moses E. Levy had title at the time of his death, and that plaintiff is the administrator of the estate of said Levy and as such entitled to the possession of said lands, and the defendants *has* had the profits of said lands for five years of yearly value of $1,000.00, and
6 refuses to deliver possession of said lands to the said plaintiff or to pay to him, as administrator aforesaid, the profits thereof. Wherefore he brings suit.

C. P. & J. C. COOPER,
Plaintiff's Attorneys.

Filed in office of clerk circuit court, Orange county, Florida, May 25, 1887.

T. J. SHINE, *Clerk*,
By J. N. BRADSHAW,
Deputy Clerk.

In the Circuit Court, 7th Judicial Circuit, Orange County, Fla.

SAMUEL BENLISA, as Administrator *de bonis non* of the Estate of Moses E. Levy, Dec'd, &c.,
vs.
WM. EDGAR BIRD and C. H. CURTIS.

Ejectment. Mesne profits, $5,000.00.

To Thomas J. Shine, clerk of said court:

Please enter our appearance for the defendants in this case as above as of the rule day in June, A. D. 1887.

June 4th, 1887.

HARTRIDGE & YOUNG,
FLEMING & DANIEL,
Att'ys for Defendants.

Filed in office of clerk circuit court, Orange county, Florida, June 6, 1887.

T. J. SHINE, *Clerk*,
By J. N. BRADSHAW,
Deputy Clerk.

7 In the Circuit Court, 7th Judicial Circuit, Orange County, State of Florida.

SAMUEL BENLISA, as Administrator *de bonis non* of the Estate of Moses E. Levy, Deceased,
vs.
WILLIAM EDGAR BIRD and C. H. CURTIS.

The defendant William Edgar Bird, by Hartridge & Young and Fleming & Daniel, his attorneys, says "that he is not guilty."

HARTRIDGE & YOUNG,
FLEMING & DANIEL,
Attorneys for Def't.

STATE OF NEW YORK, }
County of New York. }

Before me, a notary public in and for said State and county, personally came William Edgar Bird, the defendant in this case as above, who, being duly sworn, deposes and says that he has read the foregoing plea and that the same is true in substance and in fact.

WM. EDGAR BIRD.

Sworn to and subscribed before me this 27th day of June, A. D. 1887.

WM. E. BIRD, JR.,
[SEAL.] *Notary Public, Kings Co.*

Certificate filed in N. Y. Co.

Filed in office of clerk circuit court, Orange county, Florida, Jul. 1, 1887.

T. J. SHINE,
By J. N. BRADSHAW,
Deputy Clerk.

8 In the Circuit Court, 7th Judicial Circuit, Orange County, State of Florida.

SAMUEL BENLISA, as Administrator *de bonis non* of the Estate of Moses E. Levy, Deceased, } Ejectment
vs. } Affidavit.
WILLIAM EDGAR BIRD and C. H. CURTIS. }

STATE OF NEW YORK, }
County of New York, } *ss:*

I, William Edgar Bird, being duly sworn, do say that I am one of the defendants in the above-entitled cause, residing now and at the time of the commencement of this suit in the State of New York; that I have reason to believe that from prejudice and local influence I will not be able to obtain justice in said State court.

WM. EDGAR BIRD.

Subscribed by the said William Edgar Bird in my presence and by him sworn to before me, at New York, this 27th day of June, A. D. 1887.

WM. E. BIRD, JR.,
Notary Public, Kings Co.

Certf. filed in N. Y. Co.

Filed in office of clerk circuit court, Orange county, Florida, Jul. 1, 1887.

T. J. SHINE, *Clerk*,
By J. N. BRADSHAW,
Deputy Clerk.

9 In the Circuit Court, 7th Judicial Circuit, Orange County, State of Florida.

SAMUEL BENLISA, as Administrator *de bonis non* of the Estate of Moses E. Levy, Deceased,
vs.
WILLIAM EDGAR BIRD & C. H. CURTIS. } Ejectment.

Petition for removal to the circuit court of the United States for the northern district of Fla.

To the judge of said court:

Your petitioner, William Edgar Bird, respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of interest and costs, the sum of value of two thousand dollars ($2,000.00).

That the controversy — said suit is between citizens of different States, and that the petitioner was at the time of the commencement of this suit and still is a citizen of the State of New York, and that Samuel Benlisa, as administrator *de bonis non* of the estate of Moses E. Levy, deceased, the plaintiff, was then and still is a citizen of the State of Florida; that C. H. Curtis is a nominal defendant only and was then and still is a citizen of the State of Florida.

Your petitioner states that in said suit above mentioned there is a controversy which is wholly between citizens of different States and which can be fully determined as between them, to wit, a controversy between the said petitioner and the said Samuel Benlisa, as administrator *de bonis non* of the estate of Moses E. Levy, deceased.

10 And your petitioner offers herewith a bond with good and sufficient surety for his entering in the circuit court of the United States in and for the northern district of Florida on the first day of its session a copy of the record in this suit and for paying all costs that may be awarded by the said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

And he prays this honorable court to proceed no further herein except to make the order of removal required by law and to accept the said surety and bond, and to cause the record herein to be removed into the said circuit court of the United States in and for the northern district of Florida, and he will ever pray.

HARTRIDGE & YOUNG,
FLEMING & DANIEL,
Attorneys for Petitioner.

STATE OF FLORIDA, }
Duval County. }

I, John E. Hartridge, being duly sworn, do say that I am a member of the firm of Hartridge & Young, attorneys for petitioner in the above-entitled suit; that I have read the foregoing petition and

know the contents thereof, and that the statements and allegations contained therein are true as I verily believe.

JOHN E. HARTRIDGE.

Subscribed by the said John E. Hartridge in my presence and by him sworn to before me this the 30th day of June, A. D. 1887.

LOTON M. JONES, [SEAL.]
Notary Public, State of Florida at Large.

Filed in office of clerk circuit court, Orange county, Florida, Jul-1, 1887.

T. J. SHINE, *Clerk*,
By J. N. BRADSHAW, *Deputy Clerk*.

11 In the Circuit Court, 7th Judicial Circuit, Orange County, State of Florida.

SAMUEL BENLISA, as Administrator *de bonis non* of the Estate of Moses E. Levy, Deceased,
vs.
WILLIAM EDGAR BORD and C. H. CURTIS. } Ejectment. Bond.

Know all men by these presents that I, William Edgar Bird, of the State of New York, as principal, and D. C. Pratt and J. A. Heckman, as sureties, are held and firmly bound unto Samuel Benlisa, as administrator *de bonis non* of the estate of Moses E. Levi, deceased, in the penal sum of five hundred dollars; the payment whereof, well and truly to be made, unto the said Samuel Benlisa, as administrator *de bonis non* of the estate of Moses E. Levi, deceased, and his successors and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions: that said William Edgar Bird having petitioner the circuit court of Orange county, State of Florida, for the removal of a certain cause therein pending, wherein Samuel Benlisa, as administrator *de bonis non* of the estate of Moses E. Levi, deceased, is plaintiff and William Edgar Bird and C. H. Curtis are defendants, to the circuit court of the United States in and for the northern district of Florida:

Now, if the said William Edgar Bird, your petitioner, shall ento — the said circuit court of the United States in and for the northern district of Florida, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said
12 court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this 27th day of June, A. D. 1887.

WM. EDGAR BIRD. [SEAL.]
D. C. PRATT. [SEAL.]
J. A. HECKMAN. [SEAL.]

Witness to signatures—
WM. E. BIRD, JR.

We hereby consent to taking of above bond.

C. P. & J. C. COOPER,
Pl'ff's Att'ys.

June 30th, '87.

Filed in office of clerk circuit court, Orange county, Florida, Jul-1, 1887.

T. J. SHINE, *Clerk*,
By J. N. BRADSHAW,
Deputy Clerk.

13 STATE OF FLORIDA, }
County of Orange. }

I, T. J. Shine, clerk of the circuit court in and for the county and State aforesaid, do hereby certify that the above and foregoing is a true and correct copy of all of the papers in the case of Samuel Benlisa, as administrator *de bonis non* of the estate of Moses E. Levi, deceased, *vs.* Wm. Edgar Bird and C. H. Curtis, now on file in my office.

Witness my hand and the seal of said circuit court on this the 23rd day of July, A. D. 1887.

T. J. SHINE, *Clerk*,
By R. F. WAY, *D. C.*

Endorsement: Certified copy of papers in case of Samuel Benlisa, as administrator *de bonis non* of the estate of Moses E. Levi, dec'd, *vs.* Wm. Edgar Bird *et al.* Ejectment. Filed September 2, 1887. Philip Walter, clerk.

14 FRIDAY MORNING, *April 13th*, 1888.

SAMUEL BENLISA, as Adm'r *de bonis non* of the Estate of Moses E. Levy, Deceased,
vs.
WM. EDGAR BIRD. } Ejectment.

This cause came on to be heard this day; whereupon came the following jury, who were duly empanneled and sworn according to law, to wit: Jeremiah Follansby, Robert Braden, Davis Oglesby, Willis Willoughby, W. H. Enbanks, John W. McRae, John Williams, D. N. Hogan, F. P. F. Dunham, Adam Mitchell, Wm. Posey, and Jos. S. Harvey.

The case not being concluded at the hour of adjournment, it was—

Ordered that this court do now adjourn until to-morrow morning at ten o'clock.

15 SATURDAY MORNING, *April 14th*, 1888.

Court met pursuant to adjournment.

Present: The Honorable Thomas Settle, judge district court; R. M. Call, U. S. att'y; W. C. Bird, marshal; Philip Walter, clerk.

Court was opened in due form by the crier.

SAMUEL BENLISA, as Adm'r *de bonis non* of the Estate of Moses E. Levy, Deceased,
vs.
WM. EDGAR BIRD.
} Ejectment.

This cause came on to be further heard this day; whereupon came the jury heretofore empanneled and sworn, who answered to their names as follows, to wit: Jeremiah Follansby, Rob't Braden, David G. Ogilsbey, Willis Willoughby, W. H. Enbanks, John W. N. McRae, John Williams, N. D. Hogan, F. P. F. Dunham, Adam Mitchell, Wm. Posey, and Joseph S. Harvey, who, after hearing the testimony, argument of counsel, and the charge of the court, returned the following verdict:

We, the jury, find for the plaintiff, and find that Moses E. Levy was seized at the time of his death of an estate in fee in the lands described in the plaintiff's declaration, to wit: Those tracts of land in Orange county, State of Florida, known as the "Moses E. Levy" grant, designated on Government surveys as section 37 in township 17 south of range 27 east; also section 39 in township 16 south of range 27 east; also section 38 in township 16 south of range 27 east, containing 9,000 acres, more or less, and that plaintiff is the administrator *de bonis non* of the estate of said Moses E. Levy, and as such administrator is entitled to recover from defendant the possession of said real estate.

JOHN W. McRAE, *Foreman.*

16 MONDAY MORNING, *April 16th*, 1888.

SAMUEL BENLISA, as Administrator *de bonis non* of the Estate of Moses E. Levy, Deceased,
vs.
WILLIAM EDGAR BIRD.
} Ejectment.

Defendant's counsel having prayed an appeal in open court, it was ordered that the same be allowed on giving good and sufficient bond in the sum of twenty-five hundred dollars.

17 In the Circuit Court of the United States in and for the Northern District of Fla.

SAMUEL BENLISA, as Administrator of Moses E. Levy, Deceased,
vs.
WILLIAM EDGAR BIRD.

Be it remembered that a term of the circuit court of the United States in and for the northern district of Florida, held at the city of Jacksonville on the 14th day of April, A. D. 1888, a cause therein pending, wherein Samuel Benlisa, as administrator of Moses E. Levy, deceased, was plaintiff and William Edgar Bird was defendant, came on to be heard before the Honorable Thomas Settle, judge of said court, at which day came the said parties by their respective attorneys, and thereupon the said issue, in manner and form aforesaid joined between said parties, came on to be tried, and the jurors

of the jury aforesaid, whereof mention is within made, being called, likewise came and were sworn to try the said issue in manner and form aforesaid joined, and thereupon the plaintiff, to maintain the issue on his part, produced and offe-ed and read in evidence a copy of the proceedings of the supe-ior court of East Florida in words and figures as follows, to wit:

18 "Copy."

Moses E. Levy, claimant.

No. 2. 10,400 acres granted to Antonio Huertas and confirmed to said Moses E. Levy.

Petition of Huertas and Grant Thereon.

His excellency the governor:

Don Antonio Huertas, an inhabitant of this city, with due respect presents to your excellency that, although he has obtained a grant for ten thousand acres of land on the twenty-seventh of March, one thousand eight hundred and sixteen, for the purpose of raising cattle, in which he has been engaged for many years to this time, as it happens that almost all tracts consist in pine lands and as very little of it is fit for cultivation; and your petitioner, being one of those who by his good, notorious, and constant services rendered in defence of this province and by the fact of his being one of the 1st settlers thereof, is entitled in every respect to the reward of a greater quantity of acres both by the provisions of the laws concerning that subject and on account of the quality of his services, the detail of which is omitted, as they are well known to your excellency, and which consist not only in those which he has rendered in the service of his majesty, in whose employ he has been engaged since he was eighteen years old, but also in supplying in an extraordinary manner the garrison of this place in times of calamity and insurrection, in which exertions he has sacrificed his interests and exposed himself to dangers, with the assistance of which it may be said that said garrison was saved: Therefore your petitioner supplicates your excellency to be pleased to grant his fifteen thou-
19 sand acres of land more in absolute property and dominion on a stream which runs from the west and unites itself with the River St. John at about twelve miles south of Lake George, the survey being to commence at four or five miles west of the said River St. John and the said streams, dividing said tract into two parts, and the title in — for me will be reserved until your petitioner has an opportunity to proceed to the survey and delineation of the said tract made by an intelligent person, as there are difficulties to do it at this day, and owing also to the absence of the surveyor, Don George Clarke, appointed by the Government. This favor your petitioner expects to receive from the justice of your excellency.

St. Augustine, Florida, on the fifteenth of September, one thousand eight hundred and seventeen.

ANTONIO HUERTAS.

"Copy."

"*Decree.*"

ST. AUGUSTINE,
On the Fifteenth of September,
One Thousand Eight Hundred and Seventeen.

In attention to what the party represents and as the services to which he refers are well known, I grant to him, in the name of his majesty and of his royal justice which I administer, the fifteen thousand acres of land which he solicits. In order that he may possess and enjoy them in absolute property and ownership and in order that he may prove this grant, he will receive an authentic and certified copy of this expedient, which will be deposited in the secretary's office, from which will be issued the titled in form, when the survey and plats will be made as the petitioner solicits.

COPPINGER.

20 "*Petition for Survey.*"

His excellency the governor:

Don Antonio Huertas, an inhabitant of this city, with the greatest respect to your excellency — that he has determined to proceed to the survey and demarcation of fifteen thousand acres of land, which, by a grant of the 15th of September, he obtained from your excellency in absolute property as a reward for his services, on a stream which runs from the west and unites itself with the River St. John's about twelve miles south of Lake St. George, the survey being to be commenced four or five miles west of said River St. John's and the tract divided in two parts by the stream. For which purpose he supplicates your excellency to qualify the surveyor, Don Andres Burgeoin, in order that with the usual formalities he may execute the said survey in four parcels, one of which of two thousand and five hundred acres, another on one thousand five hundred, another of six hundred acres, and the remaining parcel of ten thousand four hundred acres, and from the separate plats; which favor he hopes to receive from the justice of your excellency.

St. Augustine of Florida, 13th December, 1820.

ANTONIO HUERTAS.

ST. AUGUSTINE, 13*th December*, 1820.

As he solicits, Don Andres Burgevin having accepted the commission and taken the oath and the contiguous neighbors having been summoned.

COPPINGER.

21 Before me—
JUAN DE ENTRALGO,
Notary of the Government.

Plat and certificate of survey of 10,400 acres.—I, Don Andres Burgevin, an inhabitant of this city and private surveyor, do certify that in consequence of the faculty conferred on me by a decree of

the thirteenth of December, one thousand eight hundred and twenty, issued at the instance of Son Antonio Huertas, I have surveyed for him various tracts of land forming fifteen thousand acres of land, which were granted to him as a reward for his service, on a stream running from the west and uniting itself with the St. John's river at about twelve miles south of Lake George, the tract being divided by said stream and one of the parcels comprehending ten thousand and four hundred acres, which are bounded east by another of six hundred acres and in other points by vacant lands. The figures and delineations thereof are indicated in the preceeding plat.

In testimony whereof and for the convenience of the interested party I sign the present, in St. Augustine of Florida, on the fifth of April, one thousand eight hundred and twenty-one.

(Signed) ANDRES BURGEVIN.

St. Augustine.

I certify that the preceeding is a correct translation of the Spanish document annexed.

A. GAY,
Int'r & Translator Sup. Court.

(Here follows plat marked p. 22.)

23 *Decree of the Superior Court, District of East Florida, May 22nd, 1832.*

MOSES E. LEVY
vs.
THE UNITED STATES OF AMERICA. } Land Claim, 10,400 Acres.

Whereas Moses E. Levy did, in pursuance of the act of Congress of the United States entitled "An act supplementary to the several acts providing for the s-ttlement and confirmation of private land claims in Florida," and approved 23rd May, 1828, on the 18th day of May, 1829, file his petition for the confirmation of certain lands therein mentioned in the clerk's office of the superior court for the eastern district of Florida; and whereas the attorney of the United States for this district did duly appear and answer said petition; and this cause coming on to be heard this day the said claimant, by his counsel, offered in evidence a copy from the office of the keeper of public archives of the original grant on which this claim is founded, to the receiving of which in evidence the said attorney for the United States objected, alledging that the original grant itself should be produced and its execution proved before it could be admitted in evidence, and that the original only could be received in evidence; which objection was overruled by the court and the copy from the keeper of public archives certified according to law was ordered to be received in evidence, and the court further decided that though by the express statute of this Territory copies are to be received in evidence, yet in cases where either the claimant or the

No. 139.
Bird
v.
Benlisa
p. 22.

United States shall suggest that the original in the office of the keeper of public archives is deemed necessary to be produced
24 in court, on motion therefore a subpœna will be issued by order of the court to the said keeper to appear and produce the said original in court for due examination there; and such proceedings having been had herein as that this claim was substituted to the court for its decree thereon, and the said court having examined the claim of the said petitioner and the answer of the attorney of the United States, together with the evidence and testimony filed herein, and having maturely considered the same, doth order, adjudge, and decree that this claim is valid, and that in accordance with the laws and customs of Spain and under and by virtue of the late treaty of amity settlement and limits between the United States of America and the king of Spain ratified by the President of the United States the 22nd of February, 1821, and under and by virtue of the laws of nations and of the United States—

It is hereby confirmed, adjudged, and decreed unto the said claimant, the ten thousand four hundred acres of land hereby confirmed to the said Moses E. Levy being part and parcel of fifteen thousand acres confirmed on this day to Antonio Huertas, the said ten thousand four hundred acres being set forth in the decree to the said Antonio Huertas as the fourth survey and as being bounded east by another tract of six hundred acres, and on all other sides by vacant lands and as having the following lines, to wit:

The first line begins at a pine tree and runs south twenty degrees west three hundred and twenty-two chains to another pine; the second line begins at said pine and runs north seventy degrees west three hundred and twenty-three chains to another pine; the third line begins at said pine and runs north twenty degrees east three hundred and twenty-two chains to another pine, and the
25 fourth line runs from said pine south seventy degrees east three hundred and twenty-three chains to the pine at the beginning of the first line.

Decree of the Supreme Court of the United States, Jan'y Term, 1834.

THE UNITED STATES, Applicants, *vs.* MOSES E. LEVY, Appellee. } An Appeal from the Superior Court for the Eastern District of Florida.

This cause came on to be heard on the transcript of the record from the superior court for the eastern district of Florida and was argued by counsel, on consideration whereof this court is of opinion that there is no error in so much of the decree of the superior court for the district of east Florida as declares the claim of Moses E. Levy to be valid and in so much of the said decree as confirms to the petitioner the lands conveyed to him contained in the grant to Pedro Miranda on the 10th day of September, 1817; in the grant to Philip R. Younge on the 22nd of February, 1817; in the grant to Geo. I. F. Clarke on the 17th of December, 1817, as described in the said decree, and the court doth affirm the same so far as respects the land

claimed be the petitioner in the several grants and concessions; but this court is of opinion that there is error in so much of the decree pronounced on the 23rd of May, 1832, and in so much of the decree pronounced on the 26th of the same month as confirms the title of the said Moses E. Levy to the land contained in the concession made to Antonio Huertas according to the boundaries described in the said decrees and doth so far reverse the same, and doth
26 further adjudge and decree that this cause be remanded to the superior court of the district of east Florida, with directions to conform in all things to this decree, and if it shall appear to that court that the tract of 10,400 acres has not been surveyed according to the concession made to Antonio Huertas on the 15th of September, 1817, that the same be resurveyed on the land contained in the said concession and be decreed and confirmed to the petitioner if the same be vacant.

I, William Thomas Carrall, clerk of the Supreme Court of the United States, do hereby certify that the above is a true copy of the decree of the said Supreme Court made in above-entitled cause at January term, 1834.

Extracted from the minutes of said Supreme Court.

Seal Supreme Court. In testimony whereof I have hereto subscribed my name and affixed the seal of said Supreme Court this sixth of November, in the year of our Lord one thousand eight hundred and thirty-four.

(Signed) WM. THOS. CARRAL,
Clerk of the Supreme Court of the United States.

Order of Superior Court Thereon.

In view of said decree and the said claimant having produced in this cause evidence for the purpose of showing that the survey of the said 10,400 acres of land made by Andrew Burgevin, and bearing date the 15th of April, 1821, was made at the distance of four or five miles west of the River St. Johns, and that the said land was by the surveyor aforesaid surveyed according to the concession to Antonio Huertas, bearing date the 15th of September, 1817, and the said court having duly considered the said decree of the said Supreme Court and the evidence produced by the said claimant as aforesaid, and it appearing to this court that the said 10,400
27 acres of land claimed in this case under the said concession to Antonio Huertas have been surveyed by the aforesaid surveyor, Don Adres Burgevin, according to the said concession—

It is therefore ordered and adjudged and this court doth hereby order and adjudge that the said ten thousand four hundred acres of land claimed by the said Moses E. Levy in this case under the concession to Antonio Huertas, dated the 15th of September, 1817, and according to the lines, dimensions, and boundaries contained and set forth in the plat and certificate of survey of the said Andres Burgevin dated 5th of April, 1821—that is to say, on a stream running from the west and uniting itself with the River St. Johns at about twelve miles south of Lake George, the said land lying about

claimed be the petitioner in the several grants and concessions; but this court is of opinion that there is error in so much of the decree pronounced on the 23rd of May, 1832, and in so much of the decree pronounced on the 26th of the same month as confirms the title of the said Moses E. Levy to the land contained in the concession made to Antonio Huertas according to the boundaries described in the said decrees and doth so far reverse the same, and doth
26 further adjudge and decree that this cause be remanded to the superior court of the district of east Florida, with directions to conform in all things to this decree, and if it shall appear to that court that the tract of 10,400 acres has not been surveyed according to the concession made to Antonio Huertas on the 15th of September, 1817, that the same be resurveyed on the land contained in the said concession and be decreed and confirmed to the petitioner if the same be vacant.

I, William Thomas Carrall, clerk of the Supreme Court of the United States, do hereby certify that the above is a true copy of the decree of the said Supreme Court made in above-entitled cause at January term, 1834.

Extracted from the minutes of said Supreme Court.

Seal Supreme Court. In testimony whereof I have hereto subscribed my name and affixed the seal of said Supreme Court this sixth of November, in the year of our Lord one thousand eight hundred and thirty-four.

(Signed) WM. THOS. CARRAL,
Clerk of the Supreme Court of the United States.

Order of Superior Court Thereon.

In view of said decree and the said claimant having produced in this cause evidence for the purpose of showing that the survey of the said 10,400 acres of land made by Andrew Burgevin, and bearing date the 15th of April, 1821, was made at the distance of four or five miles west of the River St. Johns, and that the said land was by the surveyor aforesaid surveyed according to the concession to Antonio Huertas, bearing date the 15th of September, 1817, and the said court having duly considered the said decree of the said Supreme Court and the evidence produced by the said claimant as aforesaid, and it appearing to this court that the said 10,400
27 acres of land claimed in this case under the said concession to Antonio Huertas have been surveyed by the aforesaid surveyor, Don Adres Burgevin, according to the said concession—

It is therefore ordered and adjudged and this court doth hereby order and adjudge that the said ten thousand four hundred acres of land claimed by the said Moses E. Levy in this case under the concession to Antonio Huertas, dated the 15th of September, 1817, and according to the lines, dimensions, and boundaries contained and set forth in the plat and certificate of survey of the said Andres Burgevin dated 5th of April, 1821—that is to say, on a stream running from the west and uniting itself with the River St. Johns at about twelve miles south of Lake George, the said land lying about

four or five miles west of the River St. Johns, bounded east by another tract of six hundred acres, and on all other sides by vacant lands, be, and the same is hereby, decreed, adjudged, and confirmed to the said Moses E. Levy.

Superior Court, East Florida.

I, Geo. R. Fairbanks, clerk of said superior court, do hereby certify that the foregoing are correct copies from the files and records of said court.

Witness my hand and the seal of said
Seal Superior Court. court this 12th March, 1845, at St. Augustine, E. F.

GEO. R. FAIRBANKS, *Clerk.*

28 Territory of Florida, District of East Florida.

By the Honorable Isaac H. Bronson, judge of the superior court for the district of east Florida.

To all to whom these presents shall come, be seen, or made known, Greeting:

Know ye that George R. Fairbanks, who hath signed the foregoing attestation, is clerk of the superior court for the district of east Florida; that all due faith and credit is and ought to be given to his acts as such, and that the foregoing attestation is in due form of law.

In testimony whereof I have hereunto set my hand and caused the seal of said court to be hereunto affixed
Seal Superior Court. this 13th day of March, A. D. 1845, and of the Independence of the United States the 69th.

J. A. BRONSON, *Judge.*

UNITED STATES SURVEYOR GENERAL'S OFFICE,
TALLAHASSEE, FLA., *3rd Oct.*, 1887.

I hereby certify the foregoing to be true and correct copies of papers — reference to the claim of Moses E. Levy for 10,400 acres on file in this office. Having no seal of office, I hereby affix my private seal.

W. D. BLOXHAM, [SEAL.]
Surveyor General.

(Here follows diagram marked pp. 29 & 30.)

31 Plat and description of the claim of Moses E. Levy for 10,457.80 acres.—This claim is "part of the 15,000 acres of Antonio Huertas," and was confirmed to Moses E. Levy by decree of the superior court of the district of east Florida on the 23rd of May, 1832. An appeal having been taken to the Supreme Court of the United States, the said decree of the superior court was affirmed by the Supreme Court of the United States at the January term, 1834.

See certified list of claims confirmed in the "superior court" and the "Supreme Court of the United States," and certified copy of the files and records of the superior court, "and of the opinion and decree of the Supreme Court in this cause," on file in surveyor general's office.

(Here follows diagram marked pp. 32 & 33.)

34 The plat of the claim of Moses E. Levy for 10,400 acres situated in township 16 & 17 south, in ranges 27 & 28 east, showing its connections with the lines of the adjoining public surveys and with the claim of Antonio Huertas on the east, is correctly constructed from the field-notes of the survey thereof, as executed in 1851 by Mascellus A. Williams, deputy surveyor, under his contract with Benj. A. Putnam, surveyor general of Florida, of the 19th of October, 1850.

Survey executed at a variation of 5 degrees east.

Description.

Beginning at a pine tree marked X. C. for S. E. corner of this survey and a corner to fractional section 6, township 17 south, range 28 east, thence N. 75 degrees W. along the south line of this survey 24.68 chains to the point of intersection with the line between sections 1 & 6, township 17 south, ranges 27 & 28 east, 44.18 chains north of the corner to sections 1, 12, 6, 7; from said point a pine bears S. 26° E. 50" links, and a pine bears 535° W. 38 links distant, 30.00 chains cross a trail bears south, 98.24 chains the point of intersections with the line between sections 1 & 2, 63.11 chains north of the corner to sections 1 & ", 11 & 12; from said point a pine bears S. 15° E. 17 links, and a pine bears S. 13° W. 54 links distant, 128.50 chains to scrub, 148.50 chains leave scrub, 180.60 chains the point of intersection with the line between sections 2 & 3, 84.18 chains north of the corner to sections 2, 3, 10, 11; from said point a pine bears S. 56° W. 28 links, and a pine bears S. 43° E. 30 links distant, 264.00 chains the point of intersections with the line between sections 3 & 4, 105.00 chains north of the corner to sections 3, 4,
35 9, 10; from said point a pine bears N. 40° W. 62 links, and a pine bears S. 43° E. 30 links distant, 268.00 chains enter scrub, 323 — a point in scrub for S. W. corner to this survey. (No description of a corner in the field-notes.)

Thence N. 15 degrees E. along the west line of this survey 191.00 chains to pond, the line this distance all through scrub, and no connections made with the line between sections 29 & 32 or between sections 20 & 29; 200.00 chains leave pond, 210.00 chains leave scrub, 215.50 chains cross a creek runs east, 239.00 chains the point of intersection with the line between sections 17 & 20; 71.99 chains east of the corner to sections 17, 18, 19, 20, no corner described in the field-notes; 240.00 chains to Bay swamp, 269.90 the point of intersection with the line between 16 and 17, 50.04 chains south of the corner to sections 8, 9, 16, 17; from said point a cypress bears S. 40°

W. 80 links, and cypress bears N. 36 W. 20 links distant; 300.00 chains cross a creek runs east, 309.00 chains leave swamp, 312.50 chains cross river runs N. E., 321.50 chains east of the corner to sections 8, 9, 16, 17, this point in swamp, no bearings taken; 323.50 chains cypress marked X. M. L. for N. W. corner to this survey and a corner to fractional section 9.

NOTE.—The east line of this survey was run N. 15° E. and the north line was run N. 75 W. 1. In the following description the courses are reversed, and objects noted in the survey of said lines are called for and described at the proper points on the line.

From the N. W. corner of this survey S. 75° E. along the north line of this survey 8.50 chains, the point of intersection with the line between sections 9 & 16; 57.40 chains west of the corner to sections 9, 10, 15, 16; from said point a pine bears S. 89° E. 40 links, and a
36 pine bears N. 33° W. 50 links distant; 10.50 chains leave swamp, 20.00 cross a road, 63.00 chains enter scrub, 67.73 chains the point of intersection with the line between sections 15 & 16, 14.85 chains south of the corner to section- 9 & 10, 15, 16; from said point a pine bears N. 57° E. 60 links, and a pine bears N. 12° W. 80 links distant; 93.50 chains leave scrub, 124.50 chains cross a branch runs north, 127.50 chains cross another branch runs north, 132.26 chains the point of intersection with the S. W. line of another claim of Moses E. Levy; 34.87 chains S. 20° E. from the intersection of said line with the north line of section 15 from said point a pine bears N. 41° E. 30 links distant, 148.50 chains to bay, 159.50 chains leave bay, 161.50 chains enter bay, 169.00 chains leave bays, 194.50 chains enter pond, 198.50 chains leave pond, 200.50 chains enter scrub, 222.50 chains leave scrub, 223.50 chains enter Baygall, 242.50 chains leave Baygall, 293.50 chains enter Baygall, 296.50 chains leave Baygall, 307.42 chains the point of intersection with the south line of another *chain* of Moses E. Levy; 9.75 chains S. 80° W. from the intersection of said line with the line between ranges 27 & 28 east (no corner described in the field-notes); 312.50 chains enter Baygall, 315.50 chains leave Baygall, 317.32 chains the point of intersection with the line between ranges 27 & 28 east, 408 south of the intersection of said line with the south line of another *chain* of Moses E. Levy; from said point a pine bears N. 12° W. 1.50 links, and a pine bears N. 13° E. 70 links, distant 323.50 chains, the point for N. E. corner of this and a corner to fractional section 19, T. 16 S., R. 28 E.; from said point a pine bears N. 10° E. 50 links, and a pine marked X C. bears N. 75° W. 40 links distant; thence S. 15 W. along the east line of this survey 10.50 chains enter grass pond, 14.50 chains leave grass pond, 19.00 chains enter scrub, 24.50 chains the point of intersection with the line between ranges
37 27 & 28 east, 51.82 chains north of the corner to sections 13, 24, 18, 19, on said range line, now inside of the claim of Antonio Huertas; 43.50 chains the point for N. W. corner to the claim of Antonio Huertas; from said point a pine marked X. H. bears N. 30 E., distance not given; 69.50 chains cross a trail, bears north; 83.50 chains cross a trail, bears north; 90.50 chains enter scrub, 123.50 chains leave scrub, 133.50 chains cross a trail,

195.00 chains to Alexander Spring creek, 201.50 chains leave creek, 223.50 chains leave swamp, 230.50 chains enter scrub, 252.50 chains leave scrub, 258.50 chains the S. W. corner to the claim of Antonio Huertas; this corner not described in the field-notes; 323.50 chains, the S. E. corner of this survey and place of beginning, containing and aggregate acres, including interferences, of (10,457.34) ten thousand four hundred and fifty-seven acres and thirty-four hundredth- of an acre.

SURVEYOR GENERAL'S OFFICE,
TALLAHASSE, FLORIDA, *Nov.* 25, '71.

The foregoing record of the plat and discription of the claim of Moses E. Levy for ten thousand acres is hereby approved.

M. L. STEARNS,
Surveyor General.

U. S. SURVEYOR GENERAL'S OFFICE,
TALLAHASSEE, FLA., *Oct. 3rd*, 1887.

I hereby certify the foregoing to be a true and correct copy of the plat and description of the claim of Moses E. Levy for ten thousand four hundred acres on file in my office. Having no seal of office, *U* here affix my private seal.

W. D. BLOXHAM,
Surveyor General. [SEAL.]

38 The plat of township 16 south, range 27 east, Florida, was examined, compared with field-notes, and approved by Benjamin A. Putnam, surveyor general, on 2nd Sept., 1852. The plat of township 17 south, range 27 east, Florida, was examined, compared with field-notes, and approved by Benjamin A. Putnem, surveyor general, on 16th May, 1853.

The plat of township 16 south, range 28 east, was examined, compared with field-notes, and approved by John Westcott, surveyor general, on 6th May, 1854.

The plat of township 18 south, ramge 28 east, Florida, was examined, compared with field-notes, and approved by Benjamin A. Putnam, surveyor general, on 2nd Sept., 1852.

I certify the foregoing to be true copies of the approvals on file in this office. Having no seal of office, I here affix my private seal.

W. D. BLOXHAM,
Surveyor General. [SEAL.]

Endorsement: Moses E. Levy. Land claim, 10,400 acres, west of Lake George. Derived under a concession of 15,000 acres to Antonio Huertas. Received in evidence & filed by plaintiff this 13th of April, 1888. Philip Walter, clerk.

39 In U. S. Circuit Court, Northern District of Florida.

SAMUEL BENLISA, as Administrator *de bonis non*, &c., of Estate of Moses E. Levy, Dec'd,
vs.
WILLIAM E. BIRD.

Ejectment.

It is agreed by and between the plaintiff and defendant in the above-entitled cause that the annexed certified copies of papers, decrees, plats, and surveys of Moses E. Levy's land claim of 10,450 acres, therein described, from surveyor general's office at Tallahassee, Florida, may be introduced, used, and treated as evidence in the above cause with like effect as the originals thereof could be so used and treated as evidence if offered and filed in said cause, subject to any objections which would apply to said originals.

C. P. & J. C. COOPER,
Pl'ff's Att'ys.
FLEMING & DANIEL,
Att'ys for Def't.

HARTRIDGE AND YOUNG,
Of Counsel for Def't.

40 Also letters of adm'n, &c.:

STATE OF FLORIDA,
St. John's County.

By the county judge for said county.

To all whom these presents shall come, Greeting:

Whereas Moses E. Levy, deceased, late of this county, died intestate, having, while he lived and at the time of his death, divers goods, chattels, and credits wit-in the county aforesaid, by means whereof the full disposition and power of granting the administration of all and singular the goods, chattels, and credits of the said deceased, and also a final dismission from the same, to the county judge aforesaid does of right belong:

Now, know *we* that I, M. R. Cooper, county judge for the county aforesaid, desiring that the goods, ch-ttels, and credits of said deceased may be well and truly administered and legally disposed of, do hereby grant unto Samuel Benlisa, administrator *de bonis non*, full power and authority to administer the goods, chattels, and credits of the deceased unadministered which to him in his lifetime and at the time of his death did belong, and to ask, demand, sue for, recover, and receive the same, and to pay the debts in which the deceased stood bound, so far as his assets will extend, according to law, and then the balance to pay over to the legal heirs and distributees of said deceased; and the said Samuel Benlisa, having giving bond and security and taken the oath and performed all other acts required by law necessary to *him* just qualifications as *a*dministrator *de bonis non*, is by order of this court and by virtue of these presents

constituted and appointed administrator *de bonis non* of all the goods, chattels, and credits of said Moses E. Levy, dec'd, unadministered.

41 Witness my name as judge aforesaid and the seal of office this sixth day of December, A. D. 1886, St. Augustine, county aforesaid.

M. R. COOPER,
County Judge.

STATE OF FLORIDA,)
County of St. Johns.)

I hereby certify that the foregoing is a true and correct copy of the letters of administration issued to Samuel Benlisa upon the estate of Moses E. Levy, dec'd, the original of which is on file and of record in this court.

Witness my hand & official seal this 6th day of December, 1886.

R. M. COOPER,
County Judge.

Endorsement: Estate of Moses E. Levy. Certified copy of letters of administration. Recorded in Book "B." M. R. Cooper, county judge. Filed in evidence & read by plaintiffs this 13th of April, 1888. P. Walter, clerk.

42 It was here admitted that Moses E. Levy died on the 7th day of September, A. D. 1854. The plaintiff then rested his case, and the said defendant then offered and read in evidence a tax deed from the State of Florida to W. H. Holden, which was duly acknowledged and recorded in Orange county, Florida, on the 13th day of December, A. D. 1876, and which is in words and figures as follows, to wit:

43 To all whom these presents shall come, Greeting:

Whereas at a sale of lands by A. W. Leondard, collector of revenue of the county of Orange, at public auction at Orlando, in the said county of Orange, on the first day of June, in the year of our Lord one thousand eight hundred and seventy-four, for the non-payment of the taxes levied and assessed thereon for the year one thousand eight hundred and seventy-three and which remained unpaid on the day of such sale, together with the costs and charges due therewith, the following-described pieces or parcels of land, to wit, section 39, township 16, of range 27; section 37, in township 17, of range 27, and section 38, in township 17, of range 28, containing nine thousand nine hundred and nine ¾ (9,909¾) acres, lying and being in Orange county, Florida, were sold to William H. Holden, who was the last bidder therefor, for the sum of fifty-five dollars and forty-nine cents, which such sum was the whole amount of taxes due and unpaid on said parcels of land for the years aforesaid, together with the interest and costs due thereon and the charges of such sale, and has been paid by the said William H. Holden to the said A. W. Leonard, collector of revenue aforesaid:

Now, therefore, know all men by these presents that the State of Florida, in consideration of the sum of money aforesaid and the premises and in conformity with law, hath and doth hereby give, grant, and convey the several tracts of land above described, together with the hereditaments and appurtenances, to the said William H. Holden and to his heirs and assigns, to their sole use and benefit forever.

In testimony whereof I, James P. Hughey, county clerk of Orange, have executed this deed pursuant to and in virtue of the
44 authority invested by law and for and on behalf of said State and have hereunto subscribed my name officially and affixed the seal of the county court of the said county of Orange, at Orlando, in the said county of Orange, this thirteenth day of December, in the year of our Lord one thousand eight hundred and seventy-six.

JAMES P. HUGHEY,
County Clerk.

Done in the presence of—
JOHN HUGHEY, JR.
E. K. FOSTER.

STATE OF FLORIDA, }
County of Orange. }

On this day personally appeared before me J. P. Hughey, county clerk, to me well known, and acknowledged that he executed the foregoing instrument of writing at the time and for the purposes therein mentioned.

Witness my hand and seal, at Orlando, this 24th day of January, A. D. 1877.

C. A. BOOM,
Justice of the Peace. [SEAL.]

Recorded on page 662.

Endorsement: J. P. Hughey, county clerk, to W. H. Holden. Tax deed. Filed for record December 13th, 1876. J. P. Hughey, clerk. Filed for record in office of the circuit court, Orange county, Florida, on the 13th day of December, A. D. 1876, and recorded in Book J of Deeds, on page 611. J. P. Hughey, clerk, by J. L. Bryan, deputy clerk. Filed by defendants this 13th day of April, 1888. Philip Walter, clerk.

45 The defendant also offered and read in evidence to support the issues on his part a deed from W. H. Holden and wife to himself, which was duly acknowledged and recorded in Orange county, Florida, on the 10th day of January, A. D. 1877, and which is in words and figures as follows, to wit:

46 This indenture, made the sixteenth day of December, in the year of our Lord one thousand eight hundred and seventy-six, between William H. Holden and Mancy A. Holden, wife of the said William H. Holden, of the county of Orange, State of Florida, of the first part, and William Edgar Bird, of the city of Brooklyn,

State of New York, of the second, witnesseth: That the said parties of the first part, for and in consideration of the sum of twelve hundred dollars, lawful money of the United States of America, to them in hand paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, conveyed, and quitclaimed, and by these presents do grant, bargain, sell, alien, and quitclaim, unto the said party of the second part and his heirs and assigns forever all that tract or parcel of land, lying and being in the county of Orange and State of Florida, described as follows, to wit, section thirty-nine, township 16, of range 27; section thirty-seven, in township 17, of range 27; section thirty-eight, in township 17, of range 28, containing nine thousand nine hundred and nine $\frac{3}{4}$ ($9909\frac{3}{4}$) acres, being the land for which the parties *if* the first part received a tax-title deed, dated the thirteenth day of December, A. D. 1876, together with all and singular the tenements, hereditaments, and appurtenances thereto *d*elonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issue*d*, and profits thereof, and also all the estate, right, tiele, interest, dower and right of dower, separate estate, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first part of, in, and to the same and every part and parcel thereof, with the appurte-
47 nances; to have and to hold the above granted, bargained, and described premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to their own proper use, benefit, and behoof forever.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

WILLIAM H. HOLDEN. [SEAL.]
NANCY A. HOLDEN. [SEAL.]

Signed, sealed, and delivered in presence of—
F. FOSTER.
C. A. BOOM.

STATE OF FLORIDA, }
Orange County. }

Know all men by these presents that I, Nancy A. Holden, wife of the above-named William H. Holden, do by these presents, made and executed by me separate and apart from my said husband and in the presence of Cassius A. Boom, a justice of the peace of the State of Florida, acknowledge and declare that I did make myself a party to and executed the foregoing quitclaim deed for the purpose of relinquishing and renouncing my dower and right of dower in and to the lands in said quitclaim deed described and granted, and that I did the same freely and voluntarily and without any compulsion, constraint, apprehension, or fear of or from my said husband, William H. Holden.

In witness whereof I hereunto subscribe my name and affix my

seal this sixteenth day of December, A. D. one thousand eight hundred and seventy-six.

NANCY A. HOLDEN. [SEAL.]

48 In the presence of—
F. FOSTER.
C. A. BOOM.

STATE OF FLORIDA, }
County of Orange. }

To all whom it may concern:

Be it known that on th s sixteenth day of December, A. D. 1876, personally appeared before me, a justice of the peace of the State of Florida, the above-named Nancy A. Holden, to me well known as the wife of William H. Holden and as one of the persons described in and who executed the foregoing quitclaim deed, who, being at the time separate and apart from her husband, the said William H. Holden, did then and there make and execute the foregoing acknowledgement, her name being with her own hand subscribed and her seal affixed in my presence.

Witness my hand and seal at Orlando the day and year above written.

C. A. BROOM, [SEAL.]
Justice of the Peace.

STATE OF FLORIDA, }
County of Orange. }

On this day personally appeared before me William H. Holden and Nancy A. Holden, to me well known as the persons described in and who executed the foregoing quitclaim deed, and acknowledged that they executed the same for the purpose therein expressed.

Whereupon it is prayed that the same may be recorded.

49 In witness whereof I have hereunto affixed my hand and seal this sixteenth day of December, A. D. 1876.

C. A. BOOM, [SEAL.]
Justice of the Peace.

Endorsement: William H. Holden — Nancy A. Holden to William Edgar Bird. Quitclaim deed. Filed for record in the office of the clerk circuit court, Orange county, Florida, January 10th, A. D. 1877, and duly recorded in said office in Book J of Deeds, on pages 633, 634, & 635. James P. Hughey, clerk, by J. L. Bryan, deputy clerk. Filed by defendants this 13th April, 1888. Philip Walter, clerk.

50 Also a certified copy of letters of administration to David L. Yulee upon the estate of Moses E. Levy:

To David Levy Yulee, Greeting:

Whereas Moses E. Levy, late of Florida, hath lately departed this life at White Sulphur Springs, Virginia, on the 7th day of September, 1854, and no will appearing, nor the existence of one being

shown to the court, and the decedent having died having and leaving goods, chattels, rights, and credits or other assets within this State and county by means whereof the ordering & granting — administration of all and singular the same, and also the auditing, allowing, and finally discharging the aaccounts thereof, doth of right belong to us, and it appearing that immediate administration is required for the due protection of the interests of decedent's estate, we do by the- presents and in virtue of the authority vested in us by law nominate & appoint you, the said David Levy Yulee, administrator of all and singular the goods, chattels, rights, and credits and other assets of the said Moses E. Levy, deceased, hereby requiring you to make a full, true, and correct inventory and appraisement thereof, and to cause the same to be returned to us within sixty days from the date hereof, and to dispose of the same according to law; to ask for, demand, and recover and receive the debts which unto the said deceased did belong at the time of his death, and to pay the debts which the said deceased did owe so far as the goods, chattels, rights, credits, and other assets of which he died possessed will extend and the law direct, and render to us, from time to time, a faithful account of your actings & doings; and particularly to render unto us annually, according to law, at the first term of our court of probate wheresoever and whensoever the same may be held, a full and correct account of your receipts and expenditures of the estate of the said deceased, and to stand to and observe what may be further ordered in the premises.

51 In witness whereof I have hereunto set my hand and affixed the seal of the probate court at the city of St. Augustine the 10th of October, 1854.

(Signed) H. HUMPHREYS,
Jud-e of Probate.

STATE OF FLORIDA, }
County of St. John's. }

PROBATE OFFICE.

I hereby certify that the foregoing is a true and correct copy of the letters of administration on the estate of Moses E. Levy, as recorded in this office.

In witness whereof I have hereunto set my hand and official seal this 8th day of December, 1887.

M. R. COOPER,
[SEAL.] *County Judge.*

Endorsement: Certified copy of letters of administration on the estate of Moses E. Levy. Filed by def'ts this 13th day of April, 1888. P. Walter, clerk.

52 Here it was admitted that David L. Yulee died in July, A. D. 1886; and the said defendant, to prove the issued in his behalf, was examined as a witness and testified as follows: I reside in New York. I purchased the land soed for in 1876 and went on the land, employed Lansing to attend to it for me, and directed him to have a house erected and to keep some one always on the land

for me. In 1881 I employed Benjamin to take charge of the place for me and directed him to keep some one always on the place, and I have paid the bills for the different persons employed by my agents to stay on the place; and the said defendant, further to prove the issued on his part, produced as a witness one Gocanauer, who testified substantially as follows: That on the 26th day of December, A. D. 1877, he went on the land sued for, and which is known as the Alexander Spring Creek grant, and also as the Moses E. Levy grant, under the employment of defendant to take charge of the land for him; that it was wild land, and in January following he began to get out timbers to erect and did erect a store on the grant and remained on the place under the employment of defendant till some time in the month of August, 1878, when he left. The defendant, further to prove the issued on his part, produced as a witness one Shockley, who testified substantially as follows: That he has lived in the immediate vicinity of and on the land sued for since 1877; that it is known as the Alexander Spring Creek grant; that he saw Gocanauer on the place, and that soon after Gocanauer left a man named Phillips, who was left the State, went on the land and occupied the house till about the 13th of May, 1879; that Phillips informed him while he was on the grant that he was there in the employment of defendant; that on or about the 13th of May, 1879,
53 Phillips left and he was employed by C. F. Lansing to go on the place, Lansing informing witness that he was the agent of the defendant and acting for him; that he slept in the house on the grant and worked on his homestead near by during the day; that he also cleared about two acres of land immediately around the store and set out orange trees thereon; that he remained on the grant till about the 20th of September, 1879, when he went to his own place; that after he left C. F. Lansing came on the grant and kept a store for a short time; that after he left one Henry Justice occupied the house on the grant and remained some time, and was followed in the occupation of the house by Lansing's sons; that they left and then Geo. M. Benjamin went to the grant and occupied the house on it; that the store which Gocanauer assisted to erect was burned and another was erected, and that was subsequently burned and a small frame dwelling erected; that afterwards a log house about 10 x 12 in dimensions was erected on the grant; that after he ceased to stay on the grant he was employed by the defendant's agent on different occasions to work on the orange grove; that several times he had seen those who succeeded him on the place cultivating the land on which the orange trees had been set out. The defendant, further to prove the issues on his part, produced as a witness one Geo. M. Benjamin, who testified substantially as follows: Witness went on the grant March 1st, 188*i*, and spelt thereon at night; he erected the log house and then occupied it at night till a few months ago, when he put one of his employees to sleep in the house; that he was employed by the defendant to stay on the grant and become his agent, and is still his agent, and was put in charge of the Alexander Spring Creek grant by defendant, and was acting in his interest; that his homestead joins the grant and he

has a house on it and cultivated his said homestead during
54 all the time he has been sleeping on the grant; that the lines of the grant are blazed and plainly marked; that he has been living in the immediate vacinity of the said grant and on the grant in manner above stated for the past ten or twelve years; that during that time there has been no one occupying any portion of said grant except those who informed him that they were there as the employees of the defendant.

The defendant, further to prove the issues in his behalf, produced as a witness one Fries, who testified substantially as follows: Witness is a surveyor by profession; is the county surveyor of Orange county, Florida; has been surveying in Florida for over eleven years; knowns the land in controversy in this suit; has surveyed it; the lines of the tract, which is a Spanish grant, are well defined; it is marked by blazes and posts put at the intersection of the section lines with the lines of the grant; surveyed the grant by the field-notes of the Government survey and found the lines correspond with the courses given in the field-notes; saw two small houses on the grant when he made the survey; one was about two or three feet inside the grant line and the other about eighteen inches. And the said defendant, further to prove the issues in his behalf, read in evidence, their execution having been first proven, a receipt from Angus Gocanauer in words and figures as follows, to wit:

55 DRAGOON, ORANGE COUNTY, FLA., *July* 31, 1881.

Received of C. F. Lansing, ag't, twenty-five dollars for services as tenant on the land of Wm. Edgar Bird, known as the Huertas grant, in Orange Co., Fla., from March 1st, 1881, to July 31st, 1881.

GEO. M. BENJAMIN.

DRAGOON, ORANGE COUNTY, FLA., *Jan'y 11th*, 1879.

Received of C. F. Lansing, agent, sixty dollars, in full for services on the property of Wm. Edgar Bird, known as the Huertas grant, in Orange county, Florida, from Dec. 26, 1877, to Jan'y 15, 1879.

ANGUS GOCARROM.

BELLEVIEW, FLORIDA, *December 1st*, 1881.

Received of C. F. Lansing, agent, the sum of five dollars for services on Wm. Edgar Bird's land in Orange Co., known as Huertas or Alexander Sp-ings Creek grant.

$5.00. GEO. M. BENJAMIN.

BELLEVIEW, FLA., *September 30th*, 1881.

Received of C. F. Lansing, agent, the sum of five dollars for se-v-*ised* on Wm. Edgar Bird's land in Orange Co., known as the Huertas or Alexander Spring Creek grant.

GEO. M. BENJAMIN.

DRAGOON, ORANGE CO., FLA., *August 31st*, 1881.

Received of C. F. Lansing, agent, the sum of five dollars for serv-

ices on Wm. Edgar Brid's land in Orange Co., known as the Huertas or Alexander Spring Creek grant.

GEO. M. BENJAMIN.

Endorsement: Filed Apr. 13, 1888. Philip Walter, clerk.

56 The defendant here closed, and the plaintiff, to further prove the issues in his behalf, produced as a witness Angus Gocanauer, who testified that an interval of some weeks, perhaps a month or two, the exact length of time not remembered, had elacsed between his leaving the Grant and Phillips going on it. The plaintiff also produced as a witness C. F. Lansing, who testified substantially as follows: Witness was the agent of the defendant from some time during the year 1877 to March, 1881, when Benjamin became defendant's agent; that as such agent he had charge of the tract of land known as the Alexander Spring Creek grant; that for a time he kept a store on the grant, the goods in which belonged to and were furnished by defendant; that several times during his agency there was no one on the grant, and his recollection was that at one time there was no one on it for a period of two months. Upon cross-examination he stated that he and defendant had fallen out and were not on speaking terms; that he had been instructed by defendant to keep some one always on the grant; that he employed the various persons to stay on the grant who occupied it prior to March, 1881, when Benjamin took charge; that the persons so employed by him would leave without giving him any notice, and that when he learned that they were gone he got some one else to go on it as soon as he could. He was asked if he did not, as the agent of defendant, pay Gocanauer for staying on the grant from Dec. 26th, 1877, to August, 1878. He answered that he could not tell exactly without his books; that his best recollection was that he did pay him for staying on the grant for about the time included between those dates. He was asked if he did not pay Phillips for staying on the grant from Dec. 26th, 1878, to May 13th, 1879. He answered
57 that he could not tell without his books, but that his best recollection was that he did pay Phillips for staying on the grant for about the time included in those dates. He was asked if he did not pay Shockley for staying on the grant from May 13th, 1879, to September 20th, 1879. He answered that he could not tell without his books, but that his best recollection was that he did pay Shockley for staying on the grant for about the time included in those dates. He was asked if he did not keep the store on the grant from Sept. 20th, 1879, to October 1st, 1880. He said he could not remember the exact dates that he kept the store, but that he was there about that time. He was asked if he did not pay Henry Justice for staying on the grant from Oct. 1st, 1880, to Feb. 1st, 1881. He answered that he could not tell without his books, but that his best recollection was that he did pay Justice for staying on the grant for about the time included in those dates. He was asked if his sons did not occupy the store on the grant from Feb. 1st, 1881, till March 1st, 1881, when Benjamin went on the place. He an-

swered that he could not remember exactly; that he knew that they were there for a short period about that time. The plaintiff, further to prove the issued in his behalf, produced as a witness one O. Baber, who testified substantially as follows: I have lived for the past ten or twelve years near the Alexander Spring Creek grant or Levy grant; know the tract; it is wild land except a small clearing near one corner; have frequently been on the grant hunting and fishing; never saw anybody doing any work on it; never saw anybody in either of the two shanties near the corner of the grant; don't know whether or not anybody slept in them at night; have not been there at night; Benjamin's fence joins onto the log house and the door opens into Benjamin's enclosure. The plaintiff
58 also produced as a witness in his behalf C. F. Hopkins, who testified that he was a surveyor by profession; had been surveying in Florida for 37 years; had surveyed the land in controversy; that running by the courses given in the field-notes of the United States survey the line corresponded with the blazed and marked line, but did not go to the corner described in the field-notes; that if the line was run to the corner described in the field-notes, and which he found, it would vary from the blazed and marked line; that taking the blazed line as the line of the grant, about two feet of the house to which Benjamin's fence was built was on Benjamin's side of the line, and if the line was run to the corner described in the field-notes the entire house would be on Benjamin's land; that, in his opinion as a surveyor, the true line was the one which placed the house on Benjamin's land; that the corner given in the field-notes should govern and not the courses, where they varied. Witness here produced a plat of his survey and testified it showed location of grant and the two shanties mentioned in the testimony as near or on grant.

59 Plaintiff then introduced as a witness one R. T. Way, who testified that he was deputy clerk of Orange county, and had been such deputy for 7 years; that as such deputy he had charge of the records of the clerk's office. He then introduced a book which he said he found along — the records of the clerk's office, and which was the assessment-roll for 1873. Plaintiff offered said book in evidence to show that no land described as section 39, township 16, of range 27; section 37, in township 17, of range 27, and section 38, in township 17, of range 28, containing nine thousand nine hundred and ninety-nine and $\frac{3}{4}$ acres, was listed on the assessment-roll. Plaintiff also read from said assessment-roll as follows:

Owner.	Des. of land.	Sec.	Town.	Range.	Acres.	Am't.
Mazell, Partin & Partin	Alexander Spring creek Grant				7,800	$18 22

Plaintiff also asked the said witness if he had searched the records of the clerk's office for a copy of the advertisement of lands to be sold for taxes by the collector for the taxes of 1873, and whether or not any such copy was on file or recorded in the records of said county of Orange; to which said question defendant, by his attorneys, did then and there object upon the ground that all inquiry into any irregularities or omissions of the officers charged with the collection of taxes and sale of land for unpaid taxes were prohibited by the statutes under which the sale in this case was made and deed executed, where the deed had been recorded in the county where the lands lie more than one year. The court overruled said objection and permitted the witness to answer said question; to which said ruling of the court the said defendant did then and there except. The witness then stated that he had made such search,
60 and that no such advertisement was on file or of record in said county. All the witnesses testified that there had been no occupation or cultivation other than as hereinbefore stated, and the balance of the grant was in a wild and uncleared state. It was admitted that the land is of the value alleged in the declaration. This being all the evidence, the said judge, the said parties having concluded and submitted their testimony and the several matters aforesaid, did then and there give his opinion and deliver his charge to the jury as follows:

"The plaintiff shows title to the land in controversy in Moses E. Levy by the grant and confirmation in evidence, and claims to recover as administrator *de bonis non* of his estate. He would be entitled to recover the possession of the land in this suit unless defendant has shown a better title of that the statutes of limitation of State of Florida have barred plaintiff's right of action."

"Defendant claims title under a deed from the clerk of Orange county, Florida, to one W. H. Holden, dated 13th day of December, A. D. 1876, based on an alleged sale of this land in 1874 for the taxes claimed to be due thereon to said State and county for year 1873, and deed from W. H. Holden and wife to defendant."

"Defendant also claims that he has held adverse possession of this property for more than seven years before the commencement of this suit, and plaintiff is not entitled to recover."

"As to the tax deed defendant contends that no suit to recover possession of the real estate claimed thereunder can be maintained unless commenced within one year after the recording of such deed, except upon the grounds that the said lands were not subject to taxation, or that the taxes were paid or tendered, together with the expenses chargeable thereon, and that this deed has been recorded since 1876. After an examination of the decisions of the
61 supreme court of the State of Florida and these tax acts, which decisions being upon a statute of local operation, bind this court, the court instructs you that the assessment on the assessment-roll in evidence being to Mazell, Parton and Parton, and the description of land thereon mentioned being Alexander Spring creek grant, and the tax deed under which defendant claims being for section 39, township 16, of range 27; section 37, in township 17, of

range 27, and section 38, in township 17, of range 28, containing none thousand nine hundred and nine and $\frac{3}{4}$ (9,909$\frac{3}{4}$) acres, lying and being in Orange county, Florida, this assessment is insufficient, and that the tax deed offered by defendant is not a deed made in pursuance of a sale of land for taxes, and that there is a variance between the said assessment and deed which cannot be aided by parol testimony, and the deed cannot be relied on by defendant to show title in this case."

To so much of which said opinion and charge of the said court as instructed the jury "that the assessment was insufficient and that the tax deed offered by defendant was not a deed made in pursuance of a sale of land for taxes and that there is a variance between the said assessment and deed which cannot be aided by parol testimony and the deed cannot be relied upon by defendant to show title in this case" the said defendant, by his attorneys, did then and there except.

"But although insufficient as a deed this tax deed is sufficient as color of title, and the defendant claims that he has had more than seven years of open, notorious adverse occupancy of this land before the commencement of this suit which has ripened into title or barred plaintiff's right of recovery; on this point the court instructs you that

62 if you find from the testimony that defendant has had more than seven years of open, notorious, continuous, adverse possession of the land in suit before the commencement of this suit, then plaintiff cannot recover, but to constitute such adverse possession the acts of defendant or his agents must have been such as to constitute such an open, notorious, continuous possession and assertion of adverse claim to said land, so as to put all other persons claiming an interest therein on notice that such assertion of adverse possession was made by defendant."

"You are the judges of the facts; you are to ascertain from what was done by defendant and any persons representing him in relation to the possession of this large tract of land whether or not there was any such open, notorious, continuous, adverse possession of this land for more than seven years before the commencement of this suit by defendant as would ordinarily call the attention and notice of parties claiming interests in such land to the fact of defendant's claim of adverse possession of this land."

And the said defendant, by his said attorneys, did then and there ask the said court, in writing, to charge the said jury as follows:

First. The defendant claims under a deed from one Holden, who claimed under a tax deed made on the 13th day of December, 1876, based upon an alleged sale for taxes of 1873, which sale was made in 1874. The tax deed is *prima facie* evidence of the regularity of all the proceedings down to the execution of the deed and of the title, and if you find from the evidence that the land in question in this suit was sold for the taxes of 1873, and the deed under which defendant claims was based upon such sale and has been duly recorded more than one year before the commencement of this suit, then the plaintiff cannot recover, unless he has shown that the

property sold for taxes was not subject to taxation, or that
63 the taxes had been paid, or that the property so sold had been redeemed."

Which said charge was refused by said court, the presiding judge announcing as his ruling that he "declined to give the charge, for the reason that there is a material difference between the tax deed in evidence and the assessment as shown in court and that the defendant cannot rest on it for title;" to which said refusal to charge as requested and ruling of the court the said defendant, by his attorneys, did then and there except.

Second. "The tax deed from the State of Florida by the clerk to Holden for the land sued for and the deed from Holden to the defendant Bird constitute color of title, and if the defendant entered upon the land claiming under these deeds and caused a house or houses to be erected thereon and a portion thereof to be cleared and orange trees planted, over seven years before the commencement of this suit, and has continued in the possession thereof, through his employees and tenants, claiming the land as his own, and no other person has been in possession thereof or any part thereof, then you must find for the defendant."

The said court then and there gave said charge, with the following words added, to wit; "Provided you find that the occupancy and acts of ownership as shown by the witnesses was open, notorious, and adverse to all the world."

To which decision and ruling of the court adding to and qualifying said charge and not giving the same as asked the defendant, by his attorneys, then and there excepted.

64 Third. "Where a known tract of land has been entered upon and a part improved by a person claiming a title founded upon a written instrument, the portion of such known tract that may have been left not cleared or not enclosed is deemed under the laws of Florida to have been occupied for the same length of time as the part improved."

Which said charge the said court then and there gave.

Fourth. "A tax deed is *prima facie* evidence of title, and if it has been duly recorded for more than one year before the commencement of the action an attack upon the regularity and validity of the sale is confined to proving that the property was not subject to taxation or that the taxes had been paid or that the property had been redeemed."

Which said charge the said court gave, with the following words added thereto: "But if it appears that there is a substantial variance between the assessment and the deed, then there has been no sale for taxes and the deed is a nullity."

To which said decision and ruling of the court adding to and qualifying said charge and not giving the same as asked the defendant, by his attorneys, then and there excepted.

Fifth. "To constitute a continuous possession it is not necessary that the occupant should be actually upon the premises continually; the mere fact that time intervenes between successive acts

of occupancy does not necessarily destroy the continuity of the possession."

Which charge the court gave as requested.

Sixth. "It is sufficient if the occupation shows an uninterrupted exercise of ownership or continued assertion of right and liability at all times to the possessory actions of the owner."

65 Which charge the court gave as requested.

And the said court, under the charges and with the directions as aforesaid, submitted the said issue and the evidence so given on the said trial to the jury, and the jury aforesaid then and there gave their verdict for the said plaintiff for the recovery of the land sued for in fee simple. Whereupon the court aforesaid at the term aforesaid did render judgment in favor of the said plaintiff and against the said defendant for the recovery of said land and — dollars costs, as appears of record; and inasmuch as the said several matters objected to or insisted upon and considered by the court do not appear by the record of the verdict and judgment aforesaid, the said defendant, by his counsel aforesaid, did then and there at the term aforesaid propose this his bill of exceptions to the said opinions and decisions of the said judge and request him to sign the same and order it to be made part of the record, which is done this the 20th day of April, A. D. 1888.

THOMAS SETTLE, *Judge.*

Endorsement: U. S. circuit court, northern dist. of Fla. Sam'l Benlisa, as administrator, *vs.* Wm. Edgar Bird. Bill of exceptions. Filed Apr. 20th, 1888. Philip Walter, clerk.

66 Supreme Court of the United States.

SAMUEL BENLISA, as Administrator *de bonis non* of the Estate of Moses E. Levy, Deceased,
vs.
WILLIAM EDGAR BIRD.
} Ejectment.

Know all men by these presents that we, William Edgar Bird, of Kings county, State of New York, William Clarke and Patrick McQuaid, county of Duval, State of Florida, are held and firmly bound unto Samuel Benlisa, of the city of Jacksonville and State of Florida, as the administrator *de bonis non* of the estate of Moses E. Levy, deceased, in the sum of twenty-five hundred dollars ($2,500.00) to be paid to the said Samuel Benlisa, his successors and assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents.

Sealed with our seals. Dated this eighteenth day of April, 1888.

Whereas the above-named William Edgar Bird hath presented a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action in the circuit court of the United States, fifth judicial circuit, northern district of Florida:

Now, therefore, the condition of this obligation is such that if the above-named William Edgar Bird shall prosecute his said writ of error to effect and answer all costs and damages if he shall fai- to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

67 WM. EDGAR BIRD. [SEAL.]
WM. CLARKE. [SEAL.]
PATRICK McQUAID. [SEAL.]

Sealed and delivered in presence of—
L. I. FLEMING.
PHILIP WALTER.

The above bond is hereby approved April 20th, 1888.
THOMAS SETTLE, *Judge.*

Endorsement: Supreme Court of the United States. William Edgar Bird, pl'ff in error, *vs.* Samuel Benlisa, as administrator *de bonis non* of estate of Moses E. Levy, dec'd, def't in error. Ejectment. Plaintiff's bond. Filed Apr. 20th, 1888. Philip Walter, clerk. Hartridge & Young, Fleming & Daniel, plaintiff's att'ys.

68 United States Circuit Court, 5th Judicial Circuit, Northern District of Florida.

SAMUEL BENLISA, as Adm'r *de bonis non* of the Estate of Moses E. Levy, Dec'd,
vs.
WILLIAM EDGAR BIRD.

I, Philip Walter, clerk of the aforesaid court, do hereby certify that the foregoing record, paged from 1 to 68, is a true, full, and complete record of the above-entitled cause, and I further certify that the accompanying book is the original book of the assessment of taxes introduced and read from on the trial of the aforesaid cause.

Witness my hand and official seal, at the city of Jacksonville, in the district and circuit aforesaid, this 15th day of September, 1888, and of Independence of the 113th year.

Seal U. S. Circuit Court, Fifth Circuit, Northern Dist. of Florida.

PHILIP WALTER, *Clerk.*

Endorsed on cover: N. Florida C. C. U. S. No. 139. William Edgar Bird, plaintiff in error, *vs.* Samuel Benlisa, administrator *de bonis non* of Moses E. Levy, deceased. Filed October 1, 1885.

Office Supreme Court U. S.
FILED.
JAN 5 1892
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1891.

WILLIAM EDGAR BIRD,
PLAINTIFF IN ERROR,

vs.

SAMUEL BENLISA,
ADMINISTRATOR, &C.

No. 139.

In Error to the Circuit Court of the United States for the Northern District of Florida.

BRIEF FOR PLAINTIFF IN ERROR.

J. B. C. DREW,
Attorney for Plaintiff in Error.

A. H. GARLAND,
H. J. MAY,
of Counsel.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1891.

Supreme Court of the United States.

OCTOBER TERM, 1891.

WILLIAM EDGAR BIRD,
PLAINTIFF IN ERROR,
v.
SAMUEL BENLISA, ADMINISTRATOR, &c.

No. 139.

In Error to the Circuit Court of the United States for the Northern District of Florida.

Brief of Plaintiff in Error.

STATEMENT OF THE CASE.

This is a writ of error brought to reverse a judgment obtained against the plaintiff in error, at the April term of the United States Circuit Court for the Northern District of Florida, 1888.

This was an action in ejectment commenced by the defendant in error in the Circuit Court of Orange county, Florida, in June, 1887. A declaration was duly filed in that court, to which the defendant filed a plea of "not guilty," under the practice obtaining in the State of Florida. Immediately thereafter, the defendant, Bird, filed his

petition for the removal of the case to the United States Circuit Court for the Northern District of Florida (he being a citizen of the State of New York), on the ground of local prejudice, under the act of Congress in such cases made and provided, whereupon the case was duly removed to the United States Court in July, 1887, and came on for trial, before his Honor, the late United States District Judge Thomas Settle, who was presiding at the Circuit Court, and a jury.

The plaintiff in the court below introduced on his part proof showing title to the land in controversy by deraignment of title from one Antonio Huertas, to whom the land in controversy was granted by the King of Spain in 1817, a portion of which was soon thereafter sold to Moses E. Levy, to wit, about 10,000 acres, more or less. Also, that in 1832, by decree of the Superior Court of the District of East Florida, title to the land in controversy was confirmed in Moses E. Levy, an appeal was duly taken to this Court, and by a decree of this Court the said decree was reversed, and sent back for a re-survey of the grant, which in due course of legal proceedings in said Superior Court (March 12, 1845) vested the title in the said Moses E. Levy.

In segregating the tract of land in controversy from the mass of the national domain, under the decree, this grant of Moses E. Levy was surveyed and platted by the Surveyor-General of Florida, describing the said grant as Section 37, in Township 17 South, of Range 27 East; also Section 39, in Township 16 South, of Range 27 East; also Section 38, in Township 10 South, of Range 27 East, containing 9,000 acres, more or less. This was in 1851. The diagram and field-notes accompanying this survey are found upon pages 15, 16, 17, and 18 of the printed record.

The plaintiff below then offered in evidence proof of

the death of the said Moses E. Levy, which occurred on the 7th day of September, 1851, and also the issuance of letters of administration *de bonis non* to the plaintiff below of the estate of the said Moses E. Levy, on the 6th day of December, 1886, and thereupon rested his case.

The defendant below then offered and read in evidence a tax deed from the State of Florida to one W. H. Holden, which was duly acknowledged and recorded in Orange county, Florida, on the 13th day of December, 1876, which deed is fully set out in the record on pages 20 and 21. This deed was made by A. W. Leonard, Collector of Revenue for the county of Orange, upon the sale of the land in controversy, for the non-payment of taxes levied and assessed thereon for the year 1873. It also appeared that the said deed was filed for record on December 13, 1876, and duly recorded on the same day.

The defendant also offered, and read in evidence, a deed from the said W. A. Holden and wife to himself, which was dated the 16th day of December, 1876, which deed was duly recorded in the county of Orange on the 10th of January, 1877, and conveyed to him the premises in controversy, this land being described in the deed from the State of Florida to Holden, and the deed from Holden to the defendant below, by sections, townships, and ranges, in accordance with the descriptions made by the Government survey referred to in 1851. This deed is set out on pp. 21–22 printed record.

The defendant also offered and read in evidence certified copies of letters of administration to David L. Yulee upon the estate of Moses E. Levy, granted on the 10th day of October, 1854. (Printed record, pages 20 and 21.) It was then admitted that David L. Yulee died in July, 1886.

The defendant below, to further prove the issues upon

his part, was examined as a witness, and also introduced several other witnesses and adduced testimony to prove his possession of the premises in question, and the cultivation and improvement of the same, by himself and agents, which continued from 1876, the date of his purchase of the land, until the date of the trial; all of which testimony is found upon pages 24, 25, 26, and 27 of printed record, the purpose of this testimony being to prove his adverse possession under the deed in question for more than the period of seven years prior to the commencement of the suit, under the statute of limitations in force in Florida. The defendant then closed his case, and the plaintiff below, in rebuttal, produced several witnesses tending to contradict the fact of the adverse possession of the defendant, and also to prove that the buildings erected upon the land in controversy were not on the land, but a short distance from the line. (This testimony is found upon pages 27 and 28 of the printed record.)

The plaintiff below then introduced one R. T. Way, the Deputy Clerk of Orange county, and introduced a book of records from his office, which was the assessment roll for 1873. The plaintiff below offered said book in evidence to show that no land described as Section 39, Township 16, of Range 27; Section 37, Township 17, Range 27; and Section 38, Township 17, of Range 28, containing 9,999¾ acres, was listed on the assessment roll.

Plaintiff also read from said assessment roll a description of the premises in controversy, as assessed, which showed that the land was assessed to—

Owner.	Des. of land.	Section.	Township.	Range.	Acres.	Amount.
Mazell, Partin & Partin	Alexander, Spring Creek, Grant.	.....	.....	.....	7,800	$18.22

The witness was further interrogated by the plaintiff's counsel, and asked if he had searched the records of the clerk's office for a copy of the advertisement of the land to be sold for taxes by the collector, in 1873; and whether or not any such copy was on file or record in the county of Orange.

This question was excepted to by the counsel for the defendant below, upon the ground that all inquiry into any irregularity or omissions of the officers charged with the collection of taxes and sale of land for unpaid taxes was prohibited by the statute under which the sale in this case was made, and deed executed, where the land taken was recorded in the county where the land lies more than one year. (Record, p. 28.)

The Court overruled this objection and permitted the witness to answer the question; to which ruling the defendant below excepted. The witness then stated that he had then made such search, and that no such advertisement was on file or on record in said county. It was admitted that there had been no occupation or cultivation of the land, other than proven, and that the balance of the grant was in a wild and neglected state. It was then admitted that the land was of the value alleged in the declaration.

This being all the evidence, the case was then submitted to the jury, under the charge of the Court; whereupon the

jury rendered a verdict in favor of the plaintiff in the court below for the land in controversy, and judgment was rendered against the defendant, to reverse which this writ of error is brought.

STATUTE LAWS OF FLORIDA APPLICABLE TO THIS CASE.

The law of Florida governing the assessment and sale of land for taxes in force (so far as applicable to this case) when the premises in controversy were assessed and sold was as follows:

Laws of Florida, 1869, chap. 1713, 2d clause, section 17 (p. 9):

"A description of each tract or parcel of land to be taxed, specifying under appropriate heads the township, range, and section in which the land lies, or if divided into lots and blocks, then the numbers of the lot and block, and the full cash value of each lot, tract, or parcel, such value to be taken from the taxpayer under oath."

SECTION 7. "Unoccupied lands, if the owner is unknown, 'may be assessed as such without inserting the name of "any person."

Section 20, of chapter 1713, laws of 1869 (page 10) provides: "If the land assessed be less or other than a sub-"division according to the United States survey, and un-"less the same is divided in lots and blocks so that it "can thereby be definitely described, it shall be described "by the boundaries thereof, *or in such other manner as to* "*make the description as definite as may be.*"

Laws of Florida, 1874, *Chap.* 1887, *Sec.* 7 (*pp.* 39 *and* 40):

"If the taxes upon any lands shall not be paid on or before the 1st day of December of any year, the collector

shall advertise and sell the same in the manner hereinafter provided. He shall make out a statement of all such lands upon which taxes shall remain due and unpaid, specifying the amount of taxes due on each parcel, together with the cost of advertising, expenses of sale, returns thereof, and conveyances, calculated upon each description, and such advertisement shall be published in some newspaper in the county where the lands are situated, in case a newspaper is published in said county, and in case no newspaper in published in such county, such notice shall be published as follows: in some newspaper published in the county, and in case there is no newspaper in such county, then in the official paper of the circuit in which such land is situated, and shall be published once in each week for at least four successive weeks in such paper previous to the day of sale."

"The publishers, proprietors, or foreman of any newspaper publishing any such notice shall forward a copy of each number of his paper containing such notice to the collector of revenue, county treasurer, and clerk of the county, by mail, containing such notice, and shall make an affidavit setting forth a copy of such notice, with the date of the first publication thereof, and the number of insertions sworn to and subscribed before some officer authorized to administer oaths in the county in which said newspaper is published, and shall send such affidavit to the county clerk of the county where such land is situated, who shall record the same among the records of his office, and after such recording, deliver it to the collector of revenue or the collector of the city or town, as the case may be."

The law in force December 16, 1876, at the time the tax deed was made to Holden conveying the premises in controversy, was as follows, the sections which are considered material being—

Section 60, of chapter 1976, of the laws of 1874 (page 26):

"On the presentation of such certificate or certificates

of sale to the county clerk or the clerk of the city or town, as the case may be, after the expiration of time provided by law in this act for the redemption of lands sold as aforesaid, unless the same have been redeemed, he shall execute to the purchaser or his heirs or assigns a deed of the land therein described (unless he shall have discovered that the same was improperly sold,) which deed shall be *prima facie* evidence of the regularity of the proceedings, from the valuation of the land by the assessors to the date of the deed inclusive, and of title to the purchaser."

Also section 63 of the same chapter, found on page 27 of the laws of 1874, provides that—

"No suit or proceeding shall be commenced by a former owner or claimant, his heirs or assigns, or his or their legal representatives, to set aside any deed made in pursuance of any sale of lands for taxes, or against the grantee in such deed, his heirs, or assigns, or legal representatives, to recover the possession of said lands, unless such suit or proceedings be commenced within one year after the recording of such deed in the county where the lands lie, except upon the grounds that the said lands were not subject to taxation or that the taxes were paid or tendered, together with the expenses chargeable thereon before sale, and the recording of such deed shall be deemed such assertion of title or such entry into possession by the grantee, his heirs or assigns, as to authorize such suit or proceedings against him or them as for an actual entry: *Provided*, That infants, persons of unsound mind or under guardianship or imprisoned, may commence such suit or proceedings within one year after such disability shall cease."

First Assignment of Error.

The Court below erred in permitting the witness, R. T. Way, Deputy Clerk of Orange county, to be asked the question if he had searched the records of the Clerk's

office for a copy of the advertisement of the lands to be sold for taxes by the Collector of Taxes of 1873, and whether or not any such copy was on file or recorded in the records of said county of Orange; who answered that he had made such search and that no such advertisement was on file or of record in said county; the defendont having objected to said testimony. (Record, p. 28.)

Argument.

I.

The admission of this evidence was clearly error under both sections (60th and 63d) of the law of 1874. It was in evidence that the deed, under which the defendant held the land in controversy, had been recorded more than one year after its sale for taxes, the tax deed to Holden (the defendant's grantor) having been recorded in 1876. (Record, p. 21.)

II.

Under the 63d section the deed, after being recorded one year, became *conclusive* as to all antecedent proceedings and open to no inquiry, except to ascertain if the land sold was subject to taxation, if the taxes had been paid or redeemed according to law. This statute had been repeatedly passed upon by the Supreme Court of Florida and sustained, and being a local statute is binding upon the Federal courts.

Sams *v.* King, 18 Fla. 557.
Florida Savings Bank *v.* Brittian, 20 Fla. 507.
Mundee *v.* Freeman, 23 Florida, 529.
Sloan *v.* Sloan, 25 Florida, 53.

III.

If the admission of this evidence is considered under the 60th section, making the deed *prima facie* evidence merely of the legality of all antecedent proceedings, it will be found that the admission of the Deputy Clerk Way's testimony was error.

a. The tax deed being declared by the statute "*prima* "*facie* evidence of the regularity of all proceedings from " the valuation of the land by the assessors to the date of " the deed, inclusive, and of the title to the purchaser," can only be overcome by positive proof of existing facts, circumstances, and conditions out of which a *fact* may be inferred. It is not enough to change the burden of proof upon the defendant, because a copy of the advertisement of the sale of lands for the year 1873 was not found by the Deputy Clerk of Orange county on file in his office in 1888, *fifteen years* afterwards; it was just this condition of affairs that caused the statute of limitation to be enacted, to put it beyond the power of the defaulting owner of the land sold to take advantage of the possible loss or destruction of records of the antecedent tax proceedings of the sale and deed by the negligence or fraud of municipal offices, constantly changing, having such records in charge. The Supreme Court of Florida reversed a judgment of the lower court in the case of Sams *v*. King above cited upon the ground of the admission of the class of testimony admitted in this case.

In Sams *v*. King (p. 569) the Court says:

"The plaintiffs, maintaining that a record of the adver- " tisement of the tax sale was essential to its validity, of- " fered the clerk of the Circuit Court to prove that no " such record was in his office. This witness testified " that some time before the trial he had examined the

" records, and did not think there was any record of the " tax sales for State and county taxes for the year 1873, " but he was not certain, and would prefer to examine the " records again before he would testify positively that " there were no such records made in this office." Mr. Justice Wescott, who delivered the opinion of the Court pointedly asks: " Is this testimony of such a character " as to shift the burden of proof as to this fact?" and citing with approval the rule laid down in Wright *v.* Durham (13 Mich. 414) by Judge Cooley: " That the presump- " tion of regularity which attaches to the deed must pre- " vail in its favor until evidence is given of facts which " show irregularity, and that it is not enough to prove facts " from which an inference of irregularity may be drawn." The Court also cites with approval the case of Case *v.* Dean (16 Mich. 158) to the effect, " that the evidence " must be such as to exclude any *reasonable* presumption " of regularity. The presumption must prevail until " plaintiff show facts inconsistent with it;" and Mr. Justice Wescott is very careful to say (page 570), " Whether it was essential to record such advertisement *we do not deter-* " *mine*. It is not here proved that it was not recorded."

In the case of Mundee *v.* Freeman (25 Fla.), above cited, an effort was made to attack the validity of the assessment upon which the tax deed was based by parol testimony to the effect that the land was never upon the roll, and an inspection of the roll itself showed that it had been mutilated, leaves of the book torn out, etc. Chief-Justice Raney, delivering the opinion of the Court (on page 535), says: " The effect of the testimony of witness " and of the mutilated tax roll is not sufficient to over- " come the '*prima facie*' evidence of a valid assessment " of the land and of the *existence* of a warrant *which* " *under the statute the tax deed constitutes.*" This, we think,

is the latest construction of this statute by the Florida Supreme Court reported or unreported, except Sloan *v.* Sloan (25 Fla.), where the cases are reviewed. The witness (Way) in this case was more positive in his opinion that the copy of the advertisement was not on file in his office than the witness in Sams *v.* King, but we submit that the principle is the same in both cases. Way did not swear that it *was never* on file, and under the authority cited it was not proof of *a fact*, but, as Judge Cooley says, *an inference* of an irregularity. This, as we have seen, cannot overcome the *prima facie* evidence of the deed itself under this statute, or by the common rules of evidence, or the maxim of the law, that "the law pre-" sumes that was done which ought to have been done."

This Court, in Geekie *v.* Kirby Carpenter Company (106 U. S. 379), gave the construction contended for by us upon a statute of Wisconsin, almost similar in phraseology with the Florida statute. A copy of the Wisconsin statute is incorporated into the opinion of the Court delivered by Mr. Justice Blatchford (p. 383), who says (on page 384): "The statute applies whenever there has been " an actual attempt, however defective in detail, to carry " out a proper exercise of the taxing power, * * * " and after the statute has run in favor of the grantee " becomes conclusive to the same extent, * * * the " lapse of time establishes conclusively the validity of the " tax and of the sale against the irregularity," following the construction of the Supreme Court of Wisconsin upon the statute in question, in Oconto County *v.* Jerrard (46 Wis. 317), and Milledge *v.* Coleman (47 Wis. 184).

Second, Third, and Fifth Assignments of Error.

Second.

The Court below erred in charging the Jury: "That "the assessment was insufficient, and that the tax deed "offered by the defendant was not a deed made in pursu- "ance of a sale of land for taxes, and that there is a vari- "ance between the said assessment and deed WHICH CAN- "NOT BE AIDED BY PAROL *testimony*, and the deed cannot "be relied upon by defendant to show title in this case."

Record, p. 30.

Third.

The Court below erred in refusing to charge the jury: "The defendant claims under a deed from one Holden, "who claimed under a tax deed on the 13th day of De- "cember, 1876, based upon an alleged sale for taxes "of 1873, which sale was made in 1874. The tax deed "is *prima facie* evidence of the regularity of all the pro- "ceedings down to the execution of the deed and of the "title, and if you find from the evidence that the land in "question in this suit was sold for the taxes of 1873, and the "deed under which defendant claims was based upon "such sale and has been duly recorded more than one "year before the commencement of this suit, then the "plaintiff cannot recover, unless he has shown that the "property sold for taxes was not subject to taxation or "that the taxes had been paid or that the property so "sold has been redeemed;" declining to give this charge, for the reason that there is a material difference between the tax deed in evidence and the assessment, as shown in court, and that the defendant cannot rest on it for title.

Record, p. 30.

Fifth.

The Court erred in adding to and qualifying the fourth charge given to the jury at the request of the defendant, the instruction given being as follows: "A tax deed is "*prima facie* evidence of title, and if it has been duly re- "corded for more than one year before the commencement "of the action, an attack upon the regularity and validity "of the sale is confined to proving that the property was "not subject to taxation, or that the taxes had been paid, "or that the property had been redeemed." The Court added the following: "But if it appears that there is a "substantial variance between the assessment and the "deed, then there has been no sale for taxes and the deed "is a nullity."

Record, p. 31.

IV.

The fourth assignment of error respecting adverse possession is abandoned, and will not be insisted upon in the argument, and therefore all the above assignments of error can be conveniently considered together, as the principle contended for, upon which we seek to reverse the judgment below, is involved in each of the instructions named, although expressed in different language in each.

We maintained in the court below the proposition that, under this statute, after the deed had been recorded one year, that the plaintiff was completely barred from any inquiry respecting the antecedent tax proceedings which culminated in the deed, and which, by the terms of the statute, became *conclusive* evidence of the fact of its validity.

The court unqualifiedly denied this proposition, and decided that there appearing to be a variance between the description of the land as entered upon the assesssment

roll, and the description of the land as set forth in the tax deed, that it was such a substantial variance as could not be overcome or explained by parol evidence to show that the land described on the assessment roll as "*Spring Garden* Creek Grant" was the same land—the same physical territory, as were described by townships, sections, and ranges in the tax deed from which the defendant deraigned his title.

His Honor Judge Settle, while delivering no written opinion in the case, in refusing to give one of the instructions asked for, said that he had arrived at that conclusion from the consideration of the statute in question, and the construction placed upon it by the supreme court of Florida. (Record p. 29.)

In this we think that the court seriously erred. As will have been seen in the discussion of the first assignment of error, the decisions of the supreme court of Florida maintained, we think, the opposite doctrine. Sams *v.* King, 18 Fla. 557; Florida Savings Bank *v.* Bruttain, 20 Fla. 507; Mundy *v.* Freeman, 23 Fla. 529; Sloan *v.* Sloan, 25 Fla. p. 53, show an unbroken current of authority in Florida in support of the proposition we here maintain.

It cannot be denied that in the case of Carncross *v.* Likes (22 Fla. 587) that the Court held that the description in the tax deed was so indefinite that no intrinsic evidence would aid in giving any validity whatsoever to the deed.

Chief-Justice Raney, who was a member of the court when "Carncross *v.* Likes" was decided, afterwards in "*Sloan* v. *Sloan*" (*supra*), on page 71, in commenting upon that case says:

"In Carncross *v.* Likes (22 Fla. 587) a similar section in the amendatory act of 1872 (*supra*) was construed by this court. Defendant in ejectment (Likes), executor, claimed to hold under a tax deed from the clerk of Hills-

borough county to his testator and Lipscomb, pursuant to a tax sale made by the collector of revenue of the same county, and description of the land upon the tax roll was block 10, 12, 13, and 16, and that in the deed was block 10, 12, and 13, in the town of Tampa, according to the general map of said town. We held that the land deeded by the clerk was never assessed by the assessor of taxes of Hillsborough county; that the description of the tax roll was so indefinite as not to designate or identify any particular land, either that described in the deed or any other, and, consequently, was no description or basis for a sale."

The court, in commenting upon "*Mundee* v. *Freeman*" (*supra*), Chief-Justice Raney, further says on the same page:

"There was legal evidence of the valid assessment of the land, and the land had been sold for taxes, and the tax deed legally recorded, and the limitation as to time had run, and we held the provisions of the section restrict the grounds of attack upon the tax deed, or sale, to be valid; the effect of the testimony of the witnesses and the tax roll not being sufficient to overcome the *prima facie* evidence of the validity of the assessment of the land, and of the existence of a warrant which, under the statute, the tax deed constitutes."

The Supreme Court, in the case of Wall *v.* Endell (20 Fla. 86), where the premises were described in the tax deed as "*a house and lot in the city of Gainesville*," held that this was so indefinite as to be absolutely void.

It is obvious, that descriptions of so indefinite a character as considered in the cases mentioned would not only be void as to a tax deed, but would be void in any other deed made between individuals, and would admit of no extrinsic evidence; neither would a court of equity entertain a bill to reform the description of such a deed, or to make it more definite, because there was nothing for

the court to act upon, as it has been frequently held that while courts would permit, under certain circumstances, oral testimony to explain or even contradict the terms of a deed or other contract, it will not undertake to make a *new deed* or a *new contract* between the parties when one did not exist before. This principle is well recognized, but such a state of facts is clearly distinguishable from the case at bar.

In this case it appears in the record that the premises in question were known and generally described as "The "Alexander Spring Creek Grant." The defendant below introduced witnesses to prove the fact of his adverse possession for over a period of eleven years of the tract in question. This testimony is found upon the printed record, pages 26 and 27, setting out five receipts for the payment of money for the services of his agents. In nearly all of them the premises in question are called the "*Alexander Spring Creek Grant*;" in one instance the Huertas or "Alexander Spring Creek Grant."

The plaintiff below, to rebut the testimony thus introduced, introduced several witnesses, who all described the premises as the "Alexander Spring Creek Grant." It is nowhere contended that the premises described on the assessment roll are not the *same premises* as described in the tax deed under which we claim; and notwithstanding all this testimony the court excluded from the jury the consideration of it, and held that the defendant had no right to show that the premises were one and the same.

It, of course, must be admitted that if our client had deraigned his title from any other source than a tax deed, that such testimony would have been clearly admissible; but it was contended below, and will, we suppose, be maintained here, that this statutory proceeding must be strictly adhered to and construed.

We contend that such a rule of statutory construction does not prevail in Florida, as evidenced by the cases cited; neither do they prevail elsewhere in States where statutes of a similar phraseology are found. This Florida statute is in almost the exact language of that of Wisconsin, construed by this Court in the case cited of "*Geekie* v. *Kirby* "*Carpenter Company*" (106 U. S.) Following the construction of that statute by the Wisconsin supreme court in the cases of "Oconto County *v.* Jarrard" (46 Wis. 317); and Milledge *v.* Coleman (47 Wis. 18), and numerous others.

It has been repeatedly held by the Wisconsin supreme court that extrinsic evidence may be introduced to show that the premises as set out in the tax deed is the same premises as described upon the assessment roll.

Mitchell *v.* Pillsbury, 5 Wis. 407.

Sexton *v.* Appleyard, 34 Wis. 235.

In "*Amberg* v. *Rogers*," 9 Michigan, 332. In that case the land described in the tax deed was by townships, sections, and ranges, and it was sought to overthrow that description and the validity of that deed, for the reason that it was shown that the United States Government had never subdivided the tract, or described it by townships, sections, and ranges, but that it was a tract irregular in shape, and not corresponding to the description borne upon the assessment roll.

The Court held in that case that if the words "or in "some other way by which it may be known" had been added to the statute which directed the manner in which the description should be made by the assessor, as was provided for by the Michigan statute directing the manner in which land in town or village plats should be described, that the description and deed would have been sustained.

It will be observed in this connection that the statute under which this assessment was made provided in Section 20 (*supra*), that "if the land assessed be less, or other "than a subdivision, according to the United States sur- "vey, and unless the same is divided into lots and blocks "so that it can be thereby definitely described, it shall be "described by the boundaries thereof, *or in such other* "*manner as to make the description as definite as may be.*"

Also, in Wright *v.* Dunham (13 Mich. p. 418), the court admitted testimony *aliunde* to show that the description upon the assessment roll and that in the deed was the same. The court says:

"It is further objected by the defendant that the description of the land, as it appears in the township returns, is defective. The returns describe it as in Township 7, Range 7, when the description should be Town. 7 *north*, Range 7 *west*. There are several Towns 7 and Ranges 7 in this State, and if there was nothing else appearing on the face of the return to identify the township intended, the objection would not be without force; but the return appears upon its face to be for the township of Berlin, in the county of Ionia, and as we are bound to take judicial notice of the political divisions of the State, and there is only one township 7 and range 7 in that township, or in that county, the land is conclusively designated, and the description is sufficient for any purpose."

To the same effect we cite Anan *v.* Baker, 49 N. H. 151; Mecklem *v.* Blake, 19 Wis. 397; also Bosworth *v.* Danzien, 25 Cal. 296, where the maxim *Id certum est quod reddi certum potest* is applied.

By the express terms of the 60th section of the Florida statute, when the deed is executed it becomes *prima facie* evidence of the regularity of all antecedent proceedings, and the owner has the right to overcome this "*de facto*"

condition, by proof of irregularities if he can show any such.

But by the terms of the 63d section of the statute after the deed has been recorded one year, it becomes *conclusive* evidence of the regularity of all antecedent proceedings, and the owner can show but two things, 1st, that the land so sold was not subject to taxation; 2d, that the tax for which it was sold was paid or tendered.

By this section (63) our deed became conclusive evidence that the lands described therein were regularly assessed and sold, and the court below erred in allowing any proof by the plaintiff except the fact that the land was not taxable or that the taxes had been paid, and under the 63d section when the statute of limitations have run upon the deed it is *conclusively* established as a valid proceeding not open to further inquiry.

This case is clearly distinguishable from the cases of Stout *v.* Martin (139 U. S.), where this Court had occasion to consider a tax deed given under the laws of the State of Kansas. The Kansas statute did not in terms make the deed *prima facie* evidence of the validity of antecedent proceedings. Certainly no section of that statute is found corresponding with the Florida statute, making the prior tax proceedings *conclusively* valid after one year. And we may here remark that in our researches we have been unable to find a statute similar in any other of the States, except as we have pointed out, the statutes of Wisconsin, the *germ* of these statutes (Wisconsin and Florida) is found in the laws of Pennsylvania, enacted in 1823, and a very interesting review of the Pennsylvania law and decisions under it is given in an opinion upon the Wisconsin statute by Judge Miller, for many years U. S. District Judge of Wisconsin, this opinion being given in a note to an opinion of the Wisconsin supreme court in the

case of Smith *v.* Cleveland (19 Wis. 856), where the construction given these statutes is the same as we contend for in this case.

Any other construction makes this statute a dead letter, and impairs the obligation of our contract, made by the State, by its deed. This statute was as much a part of our deed, as if incorporated in it—a covenant of absolute warranty after recorded one year, and it was a covenant that ran with the land.

V.

It is not denied that if the State in the exercise of its sovereign power of taxation should overstep the limitation of this power contained in its organic law,—if a tax should be levied, and land sold upon property made exempt by law, or for purposes clearly unconstitutional, this statute would not bar the Courts from inquiring into the legality of such acts, and, if necessary, hold they were usurpations of power, and void, it becomes, then, a jurisdictional question, always open to inquiry, but where, within the scope of constitutional authority, power is given to levy a tax upon property, subject to taxation, for public use, under the 60th section of this act it is *prima facie* a valid proceeding after the execution and delivery of the tax deed, and after the statute of limitation has run the deed becomes *absolutely* conclusive of the validity of all proceedings prior to it.

J. B. C. DREW,
Att'y for Pl'ff in Error.

A. H. GARLAND,
H. J. MAY,
of Counsel.

In United States Supreme Court.

WILLIAM EDGAR BIRD,
Plaintiff in Error,

vs.

SAMUEL BENLISA,
As Administrator de bonis non, of estate of Moses E. Levy, deceased,
Defendant in Error.

Writ of Error to the United States Circuit Court, Fifth Circuit in and for the Northern District of Florida.

BRIEF AND ARGUMENT OF ATTORNEYS OF DEFENDANT IN ERROR.

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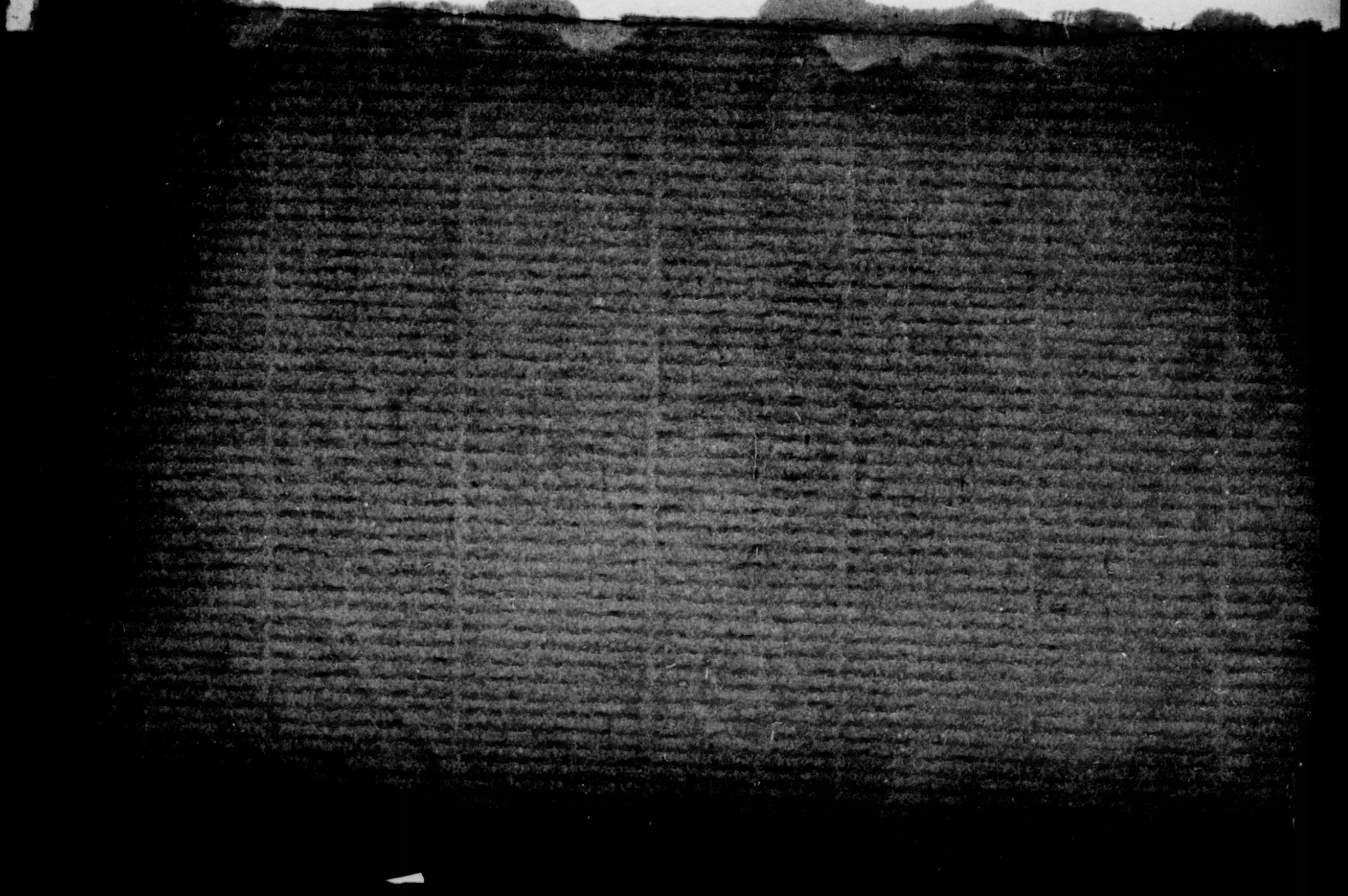

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STATEMENT OF CASE.

This cause is an action of ejectment, brought by the defendant in error, Samuel Benlisa, as administrator *de bonis non*, of estate of Moses E. Levy, deceased, against William E. Bird, plaintiff in error in this Court, but defendant in Court below. The cause was originally brought in the State Circuit Court for Orange County, in State of Florida, and was removed by said William E. Bird to the United States Circuit Court, for the Northern District of Florida, and there tried on the 13th and

14th of April, A. D. 1888, with verdict rendered as shown by the record, in favor of plaintiff below, defendant in error, here, for the recovery of the land sued for, to-wit: About 10,000 acres of land described in the declaration, as Section 37, in Township 17, South of Range 27, east; Section 39, in Township 16, south of Range 27, east; Section 38, in Township 16, south of Range 27, east.

The plaintiff below, the defendant in error in this Court, Samuel Benlisa, as administrator *de bonis non* of estate of Moses E. Levy, claimed the right to recover the land sued for, by virtue of the title of the decedent, Moses E. Levy, as the legal representative of said decedent, and if Moses E. Levy had title to said lands, this right of action in the administrator in the State of Florida is undisputed, and the well-settled practice, and no charge to the contrary, was asked by the defendant below, but same was admitted.

For decisions on this point see
Sanchez, Admr. vs. Hart, 17 Fla., 507,
Doyle vs. Wade, 23 Fla., 90.

This Honorable Court will not review the evidence except to ascertain if the law, as given by the Court, taken altogether, was correct, but to show that the Court's charges were correct, we here discuss the case made on the record.

Parsons vs Bedford, et. al.
3 Peters, 433.

The plaintiff below showed title in the decedent, Moses E. Levy, through a grant, conveying the land in suit, and other land from Spain, to one Antonio Huertas, purchase of the same by Moses E. Levy, and confirmation of the grant to Moses E. Levy by the United States Superior Court for Territory of Florida. See printed record, pages 10 to 19, inclusive. Also administration duly granted plaintiff of estate of said Levy.

The plaintiff thus established a right to recover, unless Levy's title had been divested or the Statute of Limitations had barred a recovery.

Defendant below, the plaintiff in error, sought to resist plaintiff's right to recover on two grounds, to-wit: a claim of title in himself by virtue of a certain tax deed from Jas L. Hughey, as County Clerk for Orange County, Florida, to one W. H. Holden, and deed from said Holden to

said Bird (plaintiff in error here). See printed record, pages 20 to 23, inclusive, and by the further contention that he, the said Bird, had been in the adverse, exclusive possession and occupation of the land sued for, for more than seven years before the commencement of the suit, thereby barring plaintiff's right of recovery under the Statutes of Limitation of State of Florida.

Neither of these defenses did said Bird succeed in establishing.

The alleged Tax Deed found on page 20 of the record, purporting to have been made by one James P. Hughey, as *County Clerk*, was invalid and without authority of law.

This Tax Deed recites that same was made in pursuance of a certain sale of the lands therein described as Section 39, Township 16, of Range 27; Section 37 in Township 17 of Range 27, and Section 38, in Township 17 of Range 28 by A. N. Leonard, as Tax Collector, on June 1st, 1874, "For non-payment of taxes LEVIED AND ASSESSED THEREON FOR THE YEAR 1873."

THE LAND NOT ASSESSED.

An examination of the Tax Rolls of said Orange County for the year 1873, introduced in evidence by plaintiff below, shows that these lands attempted to be conveyed by this deed never were ASSESSED FOR TAXES for the year 1873, in said County of Orange.

See original assessment roll on file with record and copy of assessment, page 28 of printed record, and not being assessed for taxes, the sale was void.

See Townsend, Admr., vs. Edwards, 25 Fla. Reps., pages 584 and 585.

Sloan vs. Sloan, 25 Fla. Reps., pages 71 to 74, inclusive.

Carncross vs Lykes, 22 Fla., 587.

TAX DEED DOES NOT FOLLOW ASSESSMENT.

An attempted assessment of some lands described on the roll as "Alexander Spring Creek Grant" appears upon said roll as assessed to "Mazell, Partin & Partin," as owner of said lands.

The deed does not follow the assessment, but undertakes to describe the land in said deed mentioned, as Section 39, Town-

ship 16 of Range 27; Section 37, in Township 17 of Range 27; Section 38, in Township 17 of Range 28.

The Clerk's deed must follow the assessment in describing the land. He cannot depart from such description and make one of his own, and any such departure is unauthorized and renders his deed void. Stout vs Mattox 139 U.S. 153. Hewitt vs Storck 31 Kansas 488.

See Carncross vs. Lykes, 22 Fla., 587.

The Clerk derives his authority to make this deed from the facts of a previous legal assessment and sale of the lands for taxes, and he must strictly follow the assessment in describing the lands he undertakes to convey. He has no authority to argue out from his personal knowledge that some other description he may prefer describes the same land as is attempted to be described in the assessment.

This point has been distinctly decided by the Supreme Court of the State of Florida in construing the Tax Acts of that State.

See Sections 54 and 60, of Acts of 1874, Laws of Florida, Chapter 1976.

Townsend vs. Edwards, 25 Fla., 584.

Sloan vs. Sloan, 25 Fla., 71.

Carncross vs. Lykes, 22 Fla., 587.

Grissom vs. Furman, 22 Fla., 582.

This, then, was not a deed "made in pursuance of a sale for taxes" as required by said tax laws, but was the Clerk's independent, unauthorized act.

The attempted assessment for taxes for the year 1873 on which this tax deed is claimed to be predicated was totally illegal and void, and amounted in law to NO ASSESSMENT AT ALL.

THE LAND NOT ASSESSED TO THE "OWNER," AS REQUIRED BY LAW.

The Tax Act in the State of Florida in force at the time this assessment was made required the land to be assessed to the "owner" or occupant of the land, or if dead to his administrator in his representative character, or if "unknown" as "Unknown."

See Sections 6 and 7, and 17 and 19, of Acts 1869, Chapter 1713, and Chapter 1976, Laws of Florida, Sections 6 and 7, 18 and 20, which read as follows:

Sec. 6. "All lands shall be assessed in the county, town, city, ward, or school district in which the same shall be; and every

person shall be assessed in the city, county, town, ward, and school district in which he resides when the assessment is made for all lands then *owned* by him within such county, city, town, ward or school district; but lands owned by one person and occupied by another, may be assessed in the name of the owner or occupant, and lands not occupied or cultivated may be assessed as non-resident.

Sec. 7. Unoccupied lands, if the owner is unknown, may be assessed as such without inserting the name of any person.

Sec. 18. He shall set down in the assessment roll, in separate columns, etc., 1st, the name of the taxable persons of the county, etc.

Sec. 20. When a person is assessed as trustee, etc., or executor or administrator, a designation of his *representative* character shall be added to his name, etc., and he shall be assessed for such real estate held by him in such representative character at the full value thereof, and for all personal property so held by him in such representative character."

This attempted assessment of this land is made to "Mazell, Partin & Partin" as "owner." The evidence in the cause clearly shows that the fee in the land was in Moses E. Levy, up to the date of his death, and was a part of his estate in 1873.

See page 20 of printed record.

David L. Yulee was appointed as his administrator 10th of October, 1854, and he continued as such up to his death, July, 1886.

In 1873, any land constituting a part of the estate of Moses E. Levy, ought to have been assessed to said David L. Yulee, as administrator of said estate of Moses E. Levy, certainly there was no authority of law for this attempted assessment to "Mazell, Partin & Partin" as "owner" of the land. Who they are, or what the term "Mazell, Partin & Partin" means, is utterly unintelligible. Certain it is, no such name or names describe the "owner" of this land sued for in this cause.

The requirements of the law as to the person to whom the land is assessable must be complied with, or the assessment and sale thereunder is void.

L'Engle vs. F. C. & W. R. R. Co., 21 Fla., 353.

L'Engle vs. Wilson, 21 Fla., 461.

18 How. (U. S. Sup. Ct.) 69. Holroyds vs. Pumphrey.

An attempted assessment, in a manner unintelligible as to whom the land is to be assessed, is void.

L'Engle vs. Wilson, 21 Fla., 461.

No such name or names as "Mazell, Partin & Partin" ever had any connection whatever with the land, and as assessment and advertisement for sale of these lands under that name gave no notice whatever to the real parties interested in the land of any tax being due on the land.

The Tax Act of Florida, above referred to, required an advertisement of the notice of the sale for taxes, as follows:

Sec. 50, Acts 1874, Chapter 1976, Laws of Florida: "Such advertisement shall be in following form to wit:

"Notice is hereby given that the following described lands will be sold at public auction on the.....day of..... at....:..... ....in the county of.....or so much thereof as will be necessary to pay the amount of taxes duly assessed against said lands, together with the cost of sale and advertising.

Owner.	Desc. of Land.	Sec.	Tow'p.	Range.	Acres	Amt.

This advertisement must follow the assessment, and we submit the representatives of Moses E. Levy would never have discovered from this designation of the ownership of the property who was intended thereby.

The Tax Act required the listing of the land to the owners in ALPHABETICAL order of names of such owners; this was intended to draw the owner's attention to the fact of the assessment of his property, which he might find both in the advertisement and assessment by running down the columns in which his name would alphabetically appear. The whole purpose of the law is DEFEATED by this attempted assessment in this case in names totally foreign to the title, and therefore the assessment and sale under it are void.

L'Engle vs. F. C. W. R. R., 21 Fla., 461.
People vs. S. B. Whipple, 47 Cal., 591.
Dunn vs. Winston, 31 Miss., 135.
42 Mo., 162, Abbott vs. Lindenbower.
97 Mass., 322, Wood vs. Torrey.
23 N. Y., 281, Whitney vs. Thomas.

THE NUMBER OF SECTION, TOWNSHIP AND RANGE NOT GIVEN IN ASSESSMENT.

The next feature of the attempted assessment that renders it void is the attempted "description of land," as follows: "Alexander Spring Creek Grant," 7,800 acres, and the spaces for "Sec." "Township" and "Range" BEING LEFT ENTIRELY BLANK.

The Tax Law of the State of Florida, above referred to—Act of 1869, Chapter 1713 Laws of Florida—distinctly requires lands to be described on the assessment roll by the "Section, Township and Range" numbers as known on the United States Government Surveys. See Section 17, which requires a description of each tract or parcel of land to be taxed, specifying under appropriate heads, the Township, Range and Section in which the land lies, or if divided into lots and blocks, then the number of the lots and blocks, etc., and the *number of acres* and parts of acres as near as the same can be ascertained, etc., as follows: See Section 17, Chapter 1713 Laws of Florida. "He shall set down on the Assessment ROLL IN SEPARATE COLUMNS, and according to the best information he can obtain.

1. The names of the taxable persons of the county.

2. A description of each tract or parcel of land to be taxed, specifying under appropriate heads, the TOWNSHIP, RANGE AND SECTION in which the land lies, etc., and the full cash value of each lot, TRACT OR PARCEL, etc.

3. The number of acres and parts of an acre, as near as same can be ascertained unless the land is divided into lots and blocks."

Each section of the land should be ASSESSED and VALUED SEPARATELY.

The United States Government had surveyed this land and gave it section, township and range numbers, as appears from said survey and plat on page 16 of record, and attached to record, to-wit: Sec. 38, Town. 16 south, Range 27 east; Sec. 39, Town. 16, south, Range 27 east; Sec. 37, Town. 16 south, Range 27 east, and Sec. 38, Town. 16, Range 17, east; but this assesment attempted to describe the land by a name entirely unknown to the records of the title or the Government survey or plats.

The Act of Congress of February 8, 1827, Vol. 4 Statutes at

Large, page 202, Sec. 7, for confirmation of these Grants provided. "It shall be the duty of the Surveyor of Public Lands in Florida to cause, under such instructions as he may receive from the Treasury Department, the said claims to be surveyed, and connected with the township lines of the public surveys, and to give to them their proper TOWNSHIP AND SECTIONAL NUMBERS agreeably to such descriptions, and he shall make separrate plats and certificates of the survey of same, etc.," which act was carried out under instructions from the General Land Office and has been the uniform practice.

Reference to which will be found in letter from Commissioner of General Land Office to Surveyor General of Florida, page 522 Vol. 6 of "American State Papers of Public Lands."

The only other description of the lands, taken altogether, are known by, on these records is "The claim of Moses E. Levy for 10,400 acres." The name of "Moses E. Levy" is the name of the grant, as marked on the plats. See pages 15 and 16 of record and Government plat attached.

No authority of law existed for attempting to describe the lands as "Alexander Spring Creek Grant," because the law distinctly provides for a description by the Section, Township and Range, and if any grant name were given the lands it ought to have been "Moses E. Levy" claim or grant, and the acreage, 10,400, instead of "Alexander Spring Creek Grant, 7,800 acres." Nothing could be more calculated to mislead the true owner than this attempted discription in this alleged assessment.

Lachman vs Clark 14 Cal. 131

THE ASSESSMENT IS OF PART ONLY OF GRANT TO-WIT: 7,800 ACRES OUT OF 10,400 ACRES, BUT WHAT PART NOT INDICATED.

The lands are not described as in the title and public surveys and the acreage is entirely different. If this is an attempt to assess the land sued for, the assessor evidently only intends to assess a PART of it, for he only assessed 7,800 acres, but he nowhere indicates *what part* of the land is intended to be included in the assessment, and this amounts to no description of any land whatever in law, and the assessment is totally null and void.

Grissom vs. Furman, 22 Fla., 581.

13 How., 18, Balance vs. Forsyth, et al.

4 Peters, 349, Ronkenderff vs. Taylor.

Tallman vs White
2 Comstock (2 N.Y.) 66.
Hill vs Mowry 6 Gray 551

14 How., 76, Raymonds vs. Longworth.

Carncross vs. Lykes, 22 Fla., 587.

An inspection of the original assessment roll itself will show how totally wanting in anything like legal form of proceeding is this attempt to dispose of this large amount of property for $18.22, TOTAL AMOUNT claimed to be due. See page 28 of record.

TAX BOOK NOT CERTIFIED, AS REQUIRED BY LAW.

The book is not certified to by the Assessor or Board of County Commissioners as correct, or as having been examined by them as required by Sec. 30, Chapter 1713, of Laws of 1869 of Fla., as follows: "When the Assessor shall have reviewed and completed his Assessment Roll, he shall attach a certificate thereto, signed by him, in the following form: "I do hereby certify that I have set down in the above assessment roll all the real estate situated in the county of.....liable to be taxed, etc. That the said assessment roll contains a true statement of the aggregate value of taxable personal estate, etc." And said book has no *warrant* directed to the Collector of taxes authorizing him to collect any taxes therein set down, or to SELL ANY LAND therein attempted to be described. Without such warrant he had no authority whatever to proceed, and this attempted sale was null and void.

See Sec. 4, Chapter 1887, Acts 1872, of Fla.

Fla. Savings Bank vs. Brittian, 20 Fla., 507.

17 Fla. Reps. 746 and 223.

This land was not advertised for sale as required by law, nor was the notice of sale given required by law.

NO RECORD OF ADVERTISEMENT MADE.

Sec. 50 of said laws of 1874, of Fla., Chapter 1976, require copies of the advertisements filed and recorded in the Clerk's office of the county, as additional notice to the owner, but this was never done in this case, as appears from the evidence, page 29 of the record.

It may be contended by plaintiff in error here, that the assessment found on page 28 of printed record is not necessarily the assessment under which this sale was made, but an examination

of the whole assessment roll of 1873, of Orange County, Florida, introduced in evidence, and here WITH the record shows it to be the only assessment in the remotest degree applicable to the land sued for; if that is not the assessment, then the land sued for never was attempted even to be assessed for taxes in Orange County, Florida, for taxes of 1873, and any attempted sale of land without any assessment whatever is clearly void.

THE OBJECTIONS MADE TO THIS DEED NOT BARRED BY ONE YEAR'S RECORD.

The reply relied upon by defendant below, plaintiff in error here, to these objections to his tax sale, is, that under the statute of Florida no attack can be made upon a tax deed which has been recorded more than one year, except by showing that the taxes have been paid or the property redeemed, or that it was not subject to taxation. Construing these provisions of the tax laws of that State, the Supreme Court of Florida has uniformly held this bar to suit or attack on such deeds, does not apply to defects of the character presented in the attempted assessment, sale, and tax deed in this case.

See Townsend vs. Edwards, 25 Fla., 585.

Sloan vs. Sloan, 25 Fla., 71 to 74.

Carncross vs. Lykes, 22 Fla., 587.

The provisions of the statute of Florida, chapter relied on by plaintiff in error, are found in Sections 60 and 63 of said Chapter, 1976, and are as follows:

Sec. 60. "Which deed shall be *prima facie* evidence of the regularity of the proceedings from the valuation of the land by the Assessors to the date of the deed, inclusive, and of title to the purchaser, etc."

Sec. 63. "No suit or proceeding shall be commenced by a former owner or claimant, his heirs or assigns, or his or their legal representatives, to set aside any deed *made in pursuance of any sale of lands for taxes*, or against the grantee in such deed, his heirs or assigns, or legal representatives, to recover the possession of said lands, unless said suit or proceedings be commenced within one year after the recording of such deed in the county where the lands lie, except upon the grounds that the said lands were not subject to taxation, or that the taxes were paid or tendered, together with the expenses chargeable thereon before sale, etc."

It will be seen from a careful reading of these sections of the said Tax Laws of Florida, that this limitation of attack upon tax deeds made under said law only refers to deeds "MADE IN PURSUANCE OF A SALE FOR TAXES."

Now, in a case like this, where the lands described in the deed are not on the assessment roll at all, the Supreme Court of Florida has decided the limitation does not apply, and there is no limit of time which can prevent the owner from showing his land was not assessed, although the Clerk of the county undertook to make a deed to it, in an alleged pursuance of an alleged sale for taxes, and such deed was attempted to be recorded on the public records for more than ONE YEAR before suit brought.

The statutory limitation will not be permitted to be used to enforce an outrage of that kind.

See Townsend vs. Edwards, 25 Fla. Reprs., page 585.

LAND DESCRIBED IN TAX DEED VARIES FROM LAND ASSESSED.

In this case the Clerk attempts to execute to W. H. Holden a tax deed to certain pieces or parcels of land, to-wit: Section 39, Township 16, of Range 27; Section 37, in Township 17, of Range 27; and Section 38, in Township 17, of Range 28, containing NINE THOUSAND, NINE HUNDRED AND NINE AND THREE-QUARTER (9,909¾) acres lying and being in Orange County, Florida." (See page 20 of printed record.)

This land, thus described in said deed, is not on the assessment ROLL OF 1873 FOR ORANGE COUNTY AT ALL.

See Assessment Roll with record.

But, says the plaintiff in error, defendant below there is an attempted assessment of some land on the roll of 1873, which was intended to be this land, as follows:

Owner.			Des. of land.	
Mazell, Partin & Partin.			Alexander Spring Creek Grant	
Sec.	Tow'p.	Range.	Acres.	Amt.
			7,800	18.72

See page 28 of printed record.

The Clerk, in making the deed, has no authority to inquire into any alleged intention of the Assessor in making the description of the land in the assessment, and said Clerk has no authority to use a different description of the land in his deed from that which appears upon the assessment roll. He cannot resort to evidence DE HORS the assessment roll to get a description of the land he thinks is intended to be assessed different from the description on the roll.

This is the distinct and positive decision of the Supreme Court of Florida, in construing these tax acts. If the Clerk does not make a deed of land according to the description of the land on the assessment roll, it is not a deed "Made in pursuance of a sale for taxes," and the limitation of attack upon it to one year from record of the deed does not apply.

See Carncross vs. Lykes, 22 Fla., 587.

PAROL EVIDENCE NOT AUTHORIZED TO SHOW DEED SAME AS ASSESSMENT DEED MUST FOLLOW ASSESSMENT.

There is no authority of law for resort to parol extraneous testimony to prove that the description of land in a TAX DEED IS THE SAME as the description of the land on the assessment roll.

The weight of authority is, that parol testimony cannot be resorted to identify what PARTICULAR LAND IS INTENDED TO BE DESCRIBED ON AN ASSESSMENT ROLL where there is an ambiguity in the description on the assessment roll, and the description in the deed IS THE SAME as that in the assessment, but no case, that we are aware, holds, that WHERE THE DESCRIPTION IN THE DEED ON ITS FACE DIFFERS IN TOTO FROM THAT ON THE ROLL, that resort can be had to parol to show that the descriptions are intended to be the same. S Toyt vs Martin 129 U.S. 153 Tallman vs White 2 Comstock (2 N.Y.) 66.

Ronkendorf vs. Forsyth, et al., 4 Peters, 349.

Cooley on Taxation, 284, 285.

Balance vs. Forsyth, et al., 13 How., 18.

Carncross vs. Lykes, 22 Fla., 581, 587.

But even if it be held that the Clerk, in making his tax deed, was authorized to ascertain what land was intended by the description "Alexander Spring Creek Grant" "7,800 acres," as

appears upon the roll, the evidence shows that he was not in fact, warranted in making the deed he did make.

The official designation upon the United States Government surveys of this land, are Sections 37, in Township 17, south of Range 27, east, containing 829 80-100 acres; also Section 39, in Township 16, south of Range 27 east, containing 8,854.70 acres; also Section 38, in Township 16, south of Range 27, east, containing 519 acres; also Section 38, in Township 17, south of Range 28, east, containing 248.40-100 acres, and altogether containing aggregate area of 10,457.45-100 acres.

Now, the assessment is of land therein designated as "Alexander Spring Creek Grant, 7,800 acres."

Now, which of these sections of land, or how much of them, was intended to be covered by the assessment no one can tell.

The assessment covers 7,800 acres; the valuation and assessment is made on that amount of land.

The sections forming the entire grant in aggregate, include 10,457.45-100 acres, leaving nearly 3,000 acres out of the assessment, but what part of that is so left out is not designated.

The Clerk's deed (page 20 of the record), is for three of the four sections, to-wit: Section 39, Township 16, of Range 27; Section 37, in Township 17, of Range 27; and Section 38, in Township 17, of Range 28, 9,909¾ acres being 2,109¾ acres more than was assessed, but leaving out of the deed Section 38, in Township *16*, south of Range *27*, east, containing 519 acres.

Now, by what authority could a mere ministerial officer, like a Clerk, ascertain that the Assessor intended to assess all of the grant except Section 38, Township 16, south of Range 27, east, or that he intended to assess 9,909¾ acres of the grant instead of 7,800 acres, as the assessment stated.

The Clerk, or as we have every reason to suppose, the grantee in the deed and the plaintiff in error (Tax Deed to Holden being executed 13th of December, 1876, and deed from Holden to Bird the 16th of December, 1876, and acknowledged before same officer, at the same place), undertook to select portions of the grant, and knowing the descriptions in the assessment to be worthless, to describe the portions so selected in the deed by their proper Section, Township and Range numbers.

But the Clerk and purchasers had no such right or authority. The Clerk should have made the purchaser a deed of exactly

what he got, to-wit: what the assessment called for, as the sale must be of the same land assessed.

In this case the Clerk undertakes to deed the purchaser 2,109⅞ acres more than is assessed, and undertakes to pick out and convey portions of the land, and leave out portions, and undertakes to convey land by an entirely different description from that appearing on the assessment roll.

Carncross vs. Lykes, 22 Fla., 585.

Sloan vs. Sloan, 25 Fla., 71 to 74.

This case strongly illustrates the danger of allowing a mere ministerial officer to ascertain for himself what land was or has not been sold for taxes, and to endeavor to convey same as he thinks was intended to be assessed, other and different from the assessment, and it is clear on authority and principle he has no such power, and his deed is void.

It is true some of the witnesses speak of this land in a general way as "Alexander Spring Creek Grant," but that was not its official designation. It is divided into sections. Each section has a separate and distinct area, and in such cases as that, the Assessor, if he intended to assess this land, he must have assessed and described each section separately.

In the meaning of the Florida tax laws, no mere loose, unofficial, general designation of a tract of land can be made the basis of a tax assessment.

And, indeed, there is nothing whatever to connect the land described in the assessment with that in the deed in this case. The acreage differs, the description differs, and there may have been more than one tract of land known as Alexander Spring Creek Grant. Certain it is, it was not for the Clerk to decide this question.

Now, as to the effect of the limitation of bringing suit within one year after record of a deed upon the questions arising out of the assessment itself.

We have clearly shown the requisites of legal assessment, to-wit: it must show the name of the owner, if assessed as in this case is, to an "owner" and it must describe the land by its Section, Township and Range numbers; the taxes must be spread out under the different heads of taxation, and the tax roll must have annexed to it a certificate of Assessor and Board of County Commissioners of its correctness, and must have annexed to it a warrant to collect from the Assessor to the Collector.

Next, we have shown from the decisions of the Supreme Court of Florida, that this limitation of one year of attack on recorded tax deed does not apply where the assessment or sale or deed is void, as in case the land attempted to be sold is not assessed, or the Clerk makes a deed of land described other than that on the assessment roll, or the assessment is made by a person not authorized by law, the whole principle of the decisions being that where the act upon which the sale or deed depends is void or unauthorized, the deed is void and the limitation does not apply.

See cases above cited from the Sup. Ct. of Florida.

LAND NOT ASSESSED TO "OWNER."

Now, it was incumbent upon the defendant below claiming under the tax title to show a legal assessment of the land, AS TO NAME OF PERSON TO whom same is assessed as "OWNER," and in DESCRIPTION OF THE LAND, because the tax law of Florida, Section 60, of Chapter 1976, only makes the deed *prima facie* evidence of the regularity of the proceeding "FROM THE VALUATION OF THE LAND TO THE DATE OF DEED." Now, in the order of the proceedings provided by this Act, "THE VALUATION" of land is PRECEDED on the assessment by the name of the OWNER and the DESCRIPTION of the land—therefore the deed was not *prima facie* evidence as to these requisites, but the common law remained in force that the person claiming under a sale by virtue of a prior legal proceedings, must show those proceedings. Therefore, in this case, the defendant below should have shown a legal assessment as to name of owner and desc
tempted to be conveyed by tax deed.

See L'Engle vs. Wilson, 21 Fla., 464.

In this case the Court says this is a great
common law, and they are not disposed to ex

This brings us to assessment, if any exists in this case.

The name of the true owner does not appear on the assessment at all, and the assessment in that respect is unauthorized. Therefore, in those rsepects, there was NO ASSESSMENT AT ALL, and the limitation of one year after record of deed does not prevent showing that fact.

L'Engle vs. Wilson, 21 Fla., 464.

Townsend vs. Edwards, 25 Fla., 584.

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In this case the Clerk undertakes to deed the purchaser 2,109¾ acres more than is assessed, and undertakes to pick out and convey portions of the land, and leave out portions, and undertakes to convey land by an entirely different description from that appearing on the assessment roll.

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This case strongly illustrates the danger of allowing a mere ministerial officer to ascertain for himself what land was or has not been sold for taxes, and to endeavor to convey same as he thinks was intended to be assessed, other and different from the assessment, and it is clear on authority and principle he has no such power, and his deed is void.

It is true some of the witnesses speak of this land in a general way as "Alexander Spring Creek Grant," but that was not its official designation. It is divided into sections. Each section has a separate and distinct area, and in such cases as that, the Assessor, if he intended to assess this land, he must have assessed and described each section separately.

In the meaning of the Florida tax laws, no mere loose, unofficial, general designation of a tract of land can be made the basis of a tax assessment.

And, indeed, there is nothing whatever to connect the land described in the assessment with that in the deed in this case. The acreage differs, the description differs, and there may have been more than one tract of land known as Alexander Spring Creek Grant. Certain it is, it was not for the Clerk to decide this question.

Now, as to the effect of the limitation of bringing suit within one year after record of a deed upon the questions arising out of the assessment itself.

We have clearly shown the requisites of legal assessment, to-wit: it must show the name of the owner, if assessed as in this case is, to an "owner" and it must describe the land by its Section, Township and Range numbers; the taxes must be spread out under the different heads of taxation, and the tax roll must have annexed to it a certificate of Assessor and Board of County Commissioners of its correctness, and must have annexed to it a warrant to collect from the Assessor to the Collector.

Next, we have shown from the decisions of the Supreme Court of Florida, that this limitation of one year of attack on recorded tax deed does not apply where the assessment or sale or deed is void, as in case the land attempted to be sold is not assessed, or the Clerk makes a deed of land described other than that on the assessment roll, or the assessment is made by a person not authorized by law, the whole principle of the decisions being that where the act upon which the sale or deed depends is void or unauthorized, the deed is void and the limitation does not apply.

See cases above cited from the Sup. Ct. of Florida.

LAND NOT ASSESSED TO "OWNER."

Now, it was incumbent upon the defendant below claiming under the tax title to show a legal assessment of the land, AS TO NAME OF PERSON TO whom same is assessed as "OWNER," and in DESCRIPTION OF THE LAND, because the tax law of Florida, Section 60, of Chapter 1976, only makes the deed *prima facie* evidence of the regularity of the proceeding "FROM THE VALUATION OF THE LAND TO THE DATE OF DEED." Now, in the order of the proceedings provided by this Act, "THE VALUATION" of land is PRECEDED on the assessment by the name of the OWNER and the DESCRIPTION of the land—therefore the deed was not *prima facie* evidence as to these requisites, but the common law remained in force that the person claiming under a sale by virtue of a prior legal proceedings, must show those proceedings. Therefore, in this case, the defendant below should have shown a legal assessment as to name of owner and description of land attempted to be conveyed by tax deed. Williams vs Kirkland 13 Wallace 306

See L'Engle vs. Wilson, 21 Fla., 464. Parker vs Overman 18 How. 140

In this case the Court says this is a great innovation on the common law, and they are not disposed to extend it.

This brings us to assessment, if any exists in this case.

The name of the true owner does not appear on the assessment at all, and the assessment in that respect is unauthorized. Therefore, in those rsepects, there was NO ASSESSMENT AT ALL, and the limitation of one year after record of deed does not prevent showing that fact.

L'Engle vs. Wilson, 21 Fla., 464.

Townsend vs. Edwards, 25 Fla., 584.

The land described in the deed is not upon the assessment roll, and the said limitation does not prevent showing that fact.

Townsend vs. Edwards, 25 Fla., 584.

Carncross vs. Lykes, 22 Fla., 585.

The law requires the land to be described by its Section, Township and Range numbers. In this respect there is certainly no assessment of the land, and the limitation will not prevent showing that fact.

The alleged description on the roll, if shown to apply to the land in question, is not the description required by law, and therefore is, in effect, no description, just as the recording of a paper not authorized by law to be recorded is no record, and there being no description of the land, the limitation will not prevent showing that fact.

The assessment was void for want of certainty as to description of the owner and of the land, and of the several amounts of the different heads of taxation required by the law then in force, and the said limitation does not prevent the showing of these facts.

The assessment roll contains no certificate of the Assessor and Board of County Commissioners to it, as to its correctness and fixing it with the lawful character of an assessment roll, or that the law was complied with in making it up, and hence it gave no authority to collect taxes therefrom or make sales of the lands thereon described, and the limitation could not prevent the showing of these facts, which go to the authority to collect and sell.

ADVERSE POSSESSION.

We understand plaintiff in error, page 14 of his brief, to abandon his assignment of error as to adverse possession, so that we do not discuss this, except to say this alleged defense was not proven and the charges of the Court submitted it as matter of fact to the jury, and they found it not proven.

THE CHARGES TAKEN TOGETHER STATE THE LAW AS TO THE TAX TITLE.

The charges practically follow the argument of the law above made as to the tax title, and hold that the Clerk had no authority to make the deed that he did to Holden, the same not corresponding with the attempted assessment.

That the attempted assessment to "Mazell, Partin & Partin,"

as "Owner," and description of land therein as "Alexander Spring Creek Grant," was void as to the land sued for, and the deed offered was void.

That parol evidence ought not to be received to show the land described in Clerk's deed to be the same as that described in the assessment.

That none of these objections were prevented by the limitation of one year after record of deed relied on by defendant below.

Where the charges of the Court below fairly presented the law of the case to the jury, taking all the charges together, the Appellate Court will not reverse the cause.

Tweed's Case & Walbrun vs. Babbitt, 16 Wallace, 577.

Ry. Co. vs. Whitton's Admr., 13 Wallace, 270.

If it appears the Court gave in another charge any matter refused even in a different charge, such refusal would not be reversable error. And where it appears by the record defendant below had no valid title to the property, no mere error in instructions would justify a reversal.

Barth vs. Clise, 12 Wallace, 400.

Evans et al. vs. Pike, 118 U. S., 241.

It will be observed that no motion for new trial was made in this case by defendant below, therefore he cannot complain if the verdict were contrary to the law, for he gave the Court below no opportunity to correct it by granting a new trial if the verdict were contrary to the law, but we submit the verdict was in accordance with the law.

REPLY TO BRIEF OF PLAINTIFF IN ERROR.

The first assignment of error of Plaintiff in error as to admitting testimony of R. T. Way, that there was no record of the advertisement of this property for sale for taxes as required by law, we deem of no importance if the objections to the tax title itself are well taken on the other grounds argued, and if this testimony ought not to have been admitted it was error without injury, but this did not effect the result of the case because no charge was asked or given on the subject and the case clearly went off on the other points.

Union Consol Silver Mine Co. vs. Taylor, 100 U. S., 37.

Chicago vs. Greer, 9 Wall., 726.

Cavazos vs. Trevino, 6 Wall., 773.

But this record of the advertisement is a part of the *notice* required by law to be given to the owner, he has a right to have the opportunity by an examination in the Clerk's office (which is the registry office in each County in Florida of all documents in reference to real estate), to ascertain if his land is advertised for sale, both before sale, in order that he may pay the taxes, and after sale that he may redeem them. Everything connected with *notice* required by the law as to tax sales must be complied with, and this was an important provision for the protection of the *owners* of the land.

Lyon vs. Ally, 130 U. S., 185.

We have discussed already the effect of the attempted Limitations of Sections 60 and 63, Chapter 1976, Laws of 1874, and under the decisions of the Supreme Court of Florida, we do not think there is a bar to showing this defect in proper *notice* of the sale.

As to the alleged conclusive character of these tax sales under Section 63 of Chapter 1976, Acts of 1874.

We have shown that this alleged bar does not apply to the objections made to the deed in this cause.

We adopt the construction given this provision by the Supreme Court of Florida in Carncross vs. Lykes, 22 Fla., 587. "There are many cases reported as to the necessity of a correct description of the land in the assessment roll and they hold almost uniformly that the want of it will vitiate the entire proceedings, &c., and in Blackwell on Tax Titles, the rule is thus laid down, 'the sale must be according to the parcels and description contained in the list, and the other proceedings, or it cannot be sustained. Again, especially must it conform to the list, as that constitutes the basis of all the subsequent proceedings. The course pursued must be consistent with itself throughout the entire proceedings. Any variance in this respect will be *fatal* to the validity of the sale.' The description of the land on the assessment roll is an important element in the purchaser's title, and it must be sold by the Collector and *deeded by the Clerk in accordance with such description.*"

"The statute was intended to prevent after lapse of a year suits by the former owner for the recovery of land upon *technical grounds for informalities and irregularities* in the proceedings. It contemplated that the deed of the Clerk alluded to would

be to the land assessed and none other. The Clerk can only make a deed to the land sold by the Collector.

The Collector can only sell the *lands as described on the assessment roll.*"

"Sec. 20 only extends its protection to the lands assessed because if other lands, or *lands differing* materially *in description are* deeded by the Clerk the deed 'is not a deed made in pursuance of a sale of land for taxes,' nor is a suit for the recovery of possession thereof a suit for lands sold for taxes."

Again in Townsend vs. Edwards 25 Fla., 585, "The Collector of Revenue derives his authority to sell property, for non-payment of taxes, under the warrant attached to the assessment roll and he can sell no property which is not on the roll, and when he does sell without such authority, such sale is without any legal authority whatever, and to say that the regularity of such transactions cannot be inquired into, is a proposition that might lead to consequences of the greatest wrong and oppression."

Again in Sloan vs. Sloan 25 Fla., 72, "The warrant annexed to the roll by the assessor when he delivered it to the *Collector* and likewise the Statute upon which it was based, authorize the Collector to collect the taxes set down in such roll *opposite to the names of persons and to the several parcels of land* therein described, and the statute authorized him to make sale of this real estate *and of none other.* The *assessment* by the Assessor was not only jurisdictional, Section 120, Burroughs on Taxation, but it is of lands assessed upon such roll at the time of its delivery to the Collector, that all the provisions of the Act as to sale or the deed speak." In all of these cases it was held that this 63d Section did not apply.

The U. S. Supreme Court in Stout vs. Martin, 139 U. S., 152, in our judgment has declared the same doctrine as the Florida cases above quoted, says the Court, "but the purchaser rests on the letter of his bond and he has a legal right so to do, but under such circumstances he must rest alone on its letter.

He has no overpowering equity to justify a large and liberal interpretation of Statutory proceedings.

Surrounding circumstances may sometimes sustain an imperfect description in a voluntary deed by a grantor, but seldom one made in hostile tax proceedings," citing:

Tallman vs. White, 2 Comstock (2. N. Y.), 66.

Hill vs. Mowry, 6 Gray, 551.

This Court cites with approval the cases of Hewitt vs. Storch, 31 Kansas, 488, to the effect: That in making a Tax Deed the County Clerk has no power to go beyond the description in the prior tax proceedings "and that" a Tax Deed to be valid must not only substantially conform to the requirements of the Statute, but must correspond with the proceedings on which it is based in all essential particulars. If the land be not redeemed within the time prescribed by the Statute, the County Clerk of the County where the sale was made, on presentation to him of the certificate of sale must execute in the name of the County, as County Clerk to the purchaser, his heirs or assigns, a deed to the land remaining unredeemed, *but he has no power to insert in the deed executed by him* another and different description *from that contained in the* tax proceedings; yet he is not to make any *material or substantial variance in the description of the property inserted in the* deed from that set forth in the prior tax proceedings upon which it is based. "Each act of the tax proceedings must correspond substantially with its immediate antecedent," says the U. S. Supreme Court. "That case is decisive of this," so is "Stout vs. Martin, 139 U. S. 151," in the light of Carncross vs. Lykes, 22 Fla., 587, and Townsend vs. Edwards, 25 Fla., 584, and Sloan vs Sloan, 25 Fla., 71 to 74, and Grissom vs. Furman, 22 Fla., 582, decisive of this case on all the points as to the illegal assessment and void tax deed, under which plaintiff in error claims in this cause.

The plaintiff in error cites a number of cases from State Courts to show that parol testimony may be resorted to to ascertain what land is intended to be described in a tax deed, and contends they apply to the case at bar. We have carefully examined them and submit that not one of them touch the points in this case, to-wit: that where a Clerk in making a tax deed has used an entirely different description and included in his *deed nearly 2000 acres more than was included in the assessment*, and has selected a part of the land to make a deed to, that in such case you cannot resort to parol testimony to cure these sort of usurpations of power on the part of a mere ministerial officer.

The case of Mitchell vs. Pillsby, 5 Wis., 407, was suit on covenants of warranty, and it was held a tax assessment covered same land as did the deed between the parties to the warranty deed, the covenants of which were sued upon. There was no variance between the assessment and any tax deed sought to be explained.

Sexton vs. Appleyard, 34 Wis., 238, letters "N. E." held to mean (N. E. ¼) no variance alleged in this case.

Amberg vs. Rogers, 9 Mich., 332, was a case where no assessment was involved, but an irregular shaped piece of land was described by Section, Township and Range numbers, instead of by metes and bounds, and Court held as statute provided for paying taxes on part of land assessed, that part of original piece must have been sold and left regular shaped piece, *because the description on the roll was not proven or shown* in the case.

In Wright vs. Dunham, 13 Mich., 418, Court held they would take judicial cognizance of Township being "North" and Range "West" were not expressed.

In Mann vs. Baker, 49 N. H., 161, the description in deed and sale exactly alike and description held on its face sufficient, but if it had been insufficient, sale void.

In Macklen vs. Blake, 19 Wis., 397, case does not show any assessment, but holds where deed described property as Lot 7, Block 17, Survey of Washington City, now called Port Washington, deed conveyed the land where the town was known by those names, although known on plat as Wisconsin City.

In Bosworth vs. Danzien, 25 Cal., 296, description reading "along Corbett Street" was rejected as impossible, where there was enough in balance of description to show that line must run along "Centre" street to comply with balance of description.

We do not find one of these cases to sustain contentions of plaintiff in error.

But the case of Stout vs. Martin, 139 U. S., 152, is distinctly against his proposition for it is there held that surrounding circumstances seldom allowed to sustain a deed made in hostile tax proceedings, and the Court quotes Tallman vs. White, 2 Comstock (2 N. Y.) 66, where the contention of plaintiff in error is distinctly repudiated, and it will be noted that the Kansas law commented on in Stout vs. Martin did contain provisions making the deed *prima facie* evidence of the proceedings and also provisions positively declaring that no irregularities or failure of officers to do their duty should invalidate the proceedings.

See General Statutes of Kansas, 1879, (Sec. 5915), 138 and Sec. (5919), 143, which were in force in 1876.

Also Last General Statutes of Kansas of 1889, (Secs. 6991, 6993, 6995 and 7008.)

But this Court held the Clerk had no power to change the description from that contained in the assessment.

NEITHER CLERK OR PURCHASER HAD ANY RIGHT OF SELECTION OF PART OF LANDS.

The tax deed in this case purports to convey to Holden, and Holden to plaintiff in error, Section 39, Township 16 of Range 27, Section 37, in Township 17 of Range 27, and Section 38, in Township 17 of Range 28, containing 9.909¾ acres, while the whole grant includes, in addition to said sections, Section *38*, Township *16* of Range *27* east, of 519 acres more, and whole grant, contains 10,457.86 acres, now here we have an assessment of some tract of land known as "Alexander Spring Creek Grant" *7800 acres*, and the deed made to certain named sections purporting to contain *9.909¾ acres*, while the whole grant contains 10.457.86 acres.

It is pointedly held the purchaser has no right of selection under a tax purchase, he must get a deed to just what he buys at the sale, hence this action of the Clerk was unauthorized and void.

2 Blackwell on Tax Titles, Secs. 769, 758.

Erwin vs. Helm, 13 Seargt & Rawle (Penn.) 151.

This assessment showed an attempt to assess 7800 acres, while this tax deed purports to convey 9.909¾ acres, here then was an attempted conveyance of *2109¾ acres which were never assessed at all*, and what part of the 9,909¾ acres is this 2.109¾ not assessed but attempted to be conveyed? We cannot tell. Therefore, this excess in the conveyance vitiates it, if it were in all respects valid, and there can be no possible bar to showing such a glaring outrage as that.

Townsend vs. Edwards, 25 Fla., 584.

An examination of this tax deed found on page 20 of the printed record discloses two vital defects on the face of the deed, to-wit:

1st. It does not conform to the statutory form of deed found in Section 60, of Chapter 1976, which reads as follows:

"To all whom these presents shall come, greeting:

Whereas, at a sale of lands by A. B., Collector of Revenue of the County of....., at public auction at..... ....., in the said County of....., on the .....day of....., in the year of our Lord one thousand eight hundred and.....

for the non-payment of the taxes levied and assessed thereon for the year one thousand eight hundred and ....., and which remained unpaid on the day of such sale, together with the costs and charges due therewith, the following described piece or parcel (pieces or parcels) was (or were) sold to....., who was the *best bidder therefor*, for the sum of....., (or if more than one tract or parcel was sold to such purchaser, then for the following mentioned sums, to-wit: Describing each tract purchased separately, and state the sum for which each was sold, and if a part of any parcel or lot shall be sold for the taxes on the whole of such parcel or lot, then describe also the whole of the lot or parcel for the tax upon which such part thereof was sold) ..... dollars and.....cents, which such sum (or if more than one lot or parcel was purchased, which several sums) was the whole amount of taxes due and unpaid on said tract (or several tracts) of land for the years aforesaid, together with the interest and costs due thereon and the charges of such sale, and has been paid by the said.....to the said A. B., Collector of Revenue aforesaid.

(Then followed same form as used in balance of tax deed in this cause, page 21 of printed record.)

But the tax deed in this cause states said Holden was the *last* bidder instead of the *best* bidder.

2d. Said deed shows on its face that *each* of the parcels of land therein mentioned were sold for the total alleged taxes on *all* of the said parcels, in other words on its face the deed shows *all* of these *parcels* were put up and sold at the same time for $55.49, being alleged taxes and expenses of sale on *all* the said parcels. This was directly contrary to the law which provided as follows, in Section 51, Chapter 1976, Laws of 1874 of Fla.: "On the day designated in the notice of sale, the Collector of Revenue shall commence the sale of those lands on which the taxes have not been paid as aforesaid, and shall continue the same from day to day until *so much of each parcel* thereof shall be sold as shall be sufficient to pay the taxes, costs and charges thereon, and in case there are no bidders, the *whole* tract shall be bidden off by the Collector for the State.

Sec. 52. The land shall be struck off to the person who will pay the tax costs and charges *for the least number of acres of land*, and the portion thereof sold shall be taken from the South

East corner of *such parcel*, and described in square form as near as may be."

Can any one make this Court believe that it was necessary to sell these three sections of land described in this deed, containing 9.909¾ acres of land, to pay an alleged claim of $55.49 of taxes, costs and interest, and that this was least portion of these lands that could be sold for that amount of money.

The deed shows on its face all these sections were put up and sold at one time together.

For the form provides where a part of a tract is sold to pay taxes on the whole, it shall be so expressed.

This sort of sale has been expressly condemned by this Court in case of French vs. Edwards, 13 Wallace, 506, where it was held if the deed showed on its face a sale of the whole of the lands at once for the taxes, the deed was void.

This Court has decided that all of the provisions in reference to assessment, notice, deposit of notice and sale made for benefit and protection of the owner must appear to have been complied with or the proceedings are void.

See Lyon vs. Ally, 130 U. S., 185.

French vs. Wallace, 13 Wallace, 506.

Plaintiff in error seeks to pick out portions of the Court's charge, and attack such selected portions, but the whole charge as to this tax title must be read together. The Court gave a charge of its own, in addition to the charges given and refused as asked by counsel, the substance of that charge is found in the Court's language on page 29 of record, as follows: "The Court instructs you that the assessment on the assessment roll in evidence being to *Mazell, Partin & Partin*, and the *description* of land therein mentioned being *Alexander Spring Creek Grant* and the Tax Deed under which defendant claims being for Section 39, Township 16, of Range 27, Section 37 in Township 17 of Range 27, and Section 38 in Township 17 of Range 28, containing 9,909¾ acres, lying and being in Orange County, Florida, this *assessment* is *insufficient* and the Tax Deed offered is not a deed made in pursuance of a sale of land for taxes, and that there is a variance between the said assessment and deed which cannot be aided by parol testimony and the deed cannot be relied on by defendant to show title."

Again, in refusing defendant's first charge, the Court "de-

clined to give the charge for the reason that there is a material difference between the Tax Deed in evidence and the assessment as shown in Court, and that the defendant cannot rest on it for title."

These charges; taken together, hold just what we have contended above as to the assessment to persons as owners, not the owners, as to description of the land, as to Clerk's unlawful action in deeding land not assessed, and the variance in description and amount of land between assessment and deed, and that deed was not of sale for taxes but was void, so that all of the objections we here make to the Tax Deed were considered and sustained by the Court below, and if any one of them are sustained by this Court then plaintiff in error, defendant below, showed no title to the land, and this Honorable Court will affirm the judgment, even if some single charge were incorrect, but we submit the charges were all correct.

We understand plaintiff in error to abandon all errors as to adverse possession, so that we have eliminated that part of our argument so as to not further cumber this brief. Suffice it to say the evidence showed no adverse possession and the jury so found under charge of the Court not now objected to here.

The Court will find the original tax roll for the County of Orange, State of Florida, with the transcript of the record in this cause, and certified to as such by the Clerk in the certificate to the record, and the same is by stipulation to be treated and considered as having been sent up as an original document in the case for the consideration of the Court, and we ask an examination of it and the alleged assessment of this land found under heading of "Mazell, Partin & Partin" as owners.

An inspection of the roll will verify the objections we have made to it and attempted assessment and the tax deed in this cause.

We submit the judgment should be affirmed

J. C. Cc
N. E. D
attys for
Error.